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TAX REPORTS

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IN THE HIGH COURT OF BOMBAY

(Before Hon'ble Justice Smt. Sujata Manohar &
Hon'ble Mr. Justice D.R. Dhanuka)

IT Reference Nos. 152 of 1978, 57 of 1983 &
E.D. Reference No. 1 of 1977

Commissioner of Income-tax

vs.

H.H. Rajendrasinghji Maharaja of Rajpipla

For the Appellant	:	**T.V. Khatri & J.P. Deodhar**
For the Respondent	:	**K.B. Bhujle & V.H. Patil**
Decided on	:	24-11-1993

HUF — Shri Raghubir Singhji (S) inheriting property of late Maharaja Rajendrasinghji (F) — Death of Maharaja after coming into force Hindu Succession Act, 1956 — Son inheriting the property contending the income of the HUF and not of individual — Further contending rule of primogeniture not applicable to the estate — Held income arising from the said property after death of F, income of HUF of S — No evidence on record to show rule of primogeniture applicable to the estate — Income arising from property to the extent of the income that arose from S's interest in the property as heir of F under the Hindu Succession Act to be assessed as income of individual of S.

Income-tax Act, 1961 — Section 4

Hindu Succession Act, 1956 — Sections 6 & 8.

FACTS

Maharaja Rajendrasinghji of Rajpipla died on or about 2-2-1963 before the end of the accounting period relevant to the A.Y. 1963-64. Income tax return for the A.Y. 1963-64 was filed by his son Raghubirsinghji in his capacity as a legal heir of late Maharaja Rahjendrasinghji. Income-tax returns for the subsequent A.Ys. were filed by Raghubirsinghji. The years involved are assessment years 1963-64 and 1964-65 to 1971-72. Income-tax Reference No. 57 of 1983 raises the same question in respect of succeeding A.Ys. 1973-74, 1974-75 and 1976-77. Estate Duty Reference No. 1 of 1977 relates to the same property as forming a part of the estate left by the deceased Maharaja Rajendrasinghji. The deceased Maharaja Rajendrasinghji of Rajpipla State was the elder son of his father H.H. Maharaja Vijaysinghji. Maharaja Vijaysinghji had two Indian wives and one English wife. Apart from the deceased

Rajendrasinghji, Maharaja Vijaysinghji had two sons Pramodsinghji and Indrajitsinghji from his Indian wives. He also had one son Rajsinghji from his English wife Elladevi. He made a will in England dated 10-11-1948 bequeathing certain properties outside India to his English wife and his son by his English wife. Maharaja Vijaysinghji also executed a will in India at Bombay on 9-1-1949 in respect of his properties and assets in the then Dominion of India and at any other place except the United Kingdom, the United States of America, France and Switzerland. What is relevant to note is that certain properties specified in those consent terms were given to the heirs of Vijaysinghji as set out therein. For example, Pramodsinghji, one of the sons of Vijaysinghji, was declared absolutely entitled to an immovable property known as 'Rajendra Villa' at Rajpipla together with all furniture, fixtures and movables lying therein, and so on. The remaining or residuary property come to the share of the deceased Rajendrasinghji. The consent terms provided that none of the other heirs will have any right, title or interest in respect of the remaining property as also in respect of the Privy Purse that was being received by Rajendrasinghji and which may be received by his successors to the Rajpipla State and its 'Gadi' as well as any other properties movable or immovable whatsoever. The deceased Rajindrasinghji became the owner of the properties left by his father Vijaysinghji other than those given over to the defendants in the said suit. One of the properties which so came to him under the consent terms was the Rajpipla palace. He also became entitled to the Privy Purse which he was already receiving. Raghubirsinghji the son of the deceased Rajendrasinghji as the legal heir of the deceased Rajendrasinghji, filed his income-tax return for the A.Y. 1963-64 as Rajendrasinghji died during the relevant accounting year for the A.Y. 1963-64. The income-tax returns for the other A.Yrs. which are under consideration before us in these references, have been filed by Raghubirsinghji. In the income-tax return for the A.Y. 1963-64 the income from the Rajpipla palace as also certain other incomes were returned as the income of the HUF of the deceased Maharaja Rajendrasinghji. In the subsequent A.Ys. the income from Rajpipla palace is shown as of the HUF of Raghubirsinghji. This was not acceptable to the ITO who, in his assessment orders, held that the entire income was the individual income of the deceased Maharaja Rajendrasinghji for the A.Y. 1963-64 and of Raghubirsinghji for the subsequent A.Ys. in question. Ultimately, the Tribunal, however, has, on the basis of the judgment and order of the Tribunal in estate duty proceedings, held that the income, inter alia, from Rajpipla palace will have to be considered as income of the HUF of the deceased Maharaja Rajendrasinghji for the A.Y. 1963-64 and of the HUF of Raghubirsinghji for the subsequent A.Ys. in question.

DECISION

In order to decide these questions it is necessary for us to examine the

nature of the property in the hands of Maharaja Vijaysinghji, the father of the deceased Rajendrasinghji and thereafter the nature of the property in the hands of the deceased Maharaja Rajendrasinghji - the property being Rajpipla palace. We are not concerned with other properties. We have to consider the nature of the interest of Raghubirsinghji in the Rajpipla palace. As Rajpipla palace was a property belonging to the HUF of Rajendrasinghji, Raghubirsinghji had an interest in the said property by virtue of his being a coparcener in the said HUF. But in respect of the interest of Rajendrasinghji in the said HUF property, a portion of which devolved by intestate succession on Raghubirsinghji under the Hindu Succession Act. Raghbirsinghji would be entitled to it as an individual inheriting the property u/s 6. The income, therefore, which accrues to Raghubirsinghji in respect of the said property will have to be proportionately divided and a portion considered as income of the HUF and the remaining income as income of Raghubirsinghji as an individual. The division of income will have to be in the same proportion as the HUF interest of Raghbirsinghji in the said property and his individual interest in the said property which he inherited from his father under the Hindu Succession Act. For the above purpose, the share of Raghbirsinghji in the said property as a coparcener in the HUF of Rajendrasinghji as also his share in the said property as the heir of Rajendrasinghji under the Hindu Succession Act, shall be worked out by the Tribunal when the matter goes back to the Tribunal for giving effect to our order and the share of Raghubirsinghji in the income of the said property shall be worked out accordingly.

On the coming into force of the Hindu Succession Act, the position altered materially. Under section 4 of the Hindu Succession Act, save as otherwise expressly provided in the Act, any custom or usage, *inter alia*, as part of *the Hindu law then in force immediately before the commencement* of this Act shall cease to have effect with respect of any matter for which provision is made in this Act. Section 5, however, has carved out certain exceptions. Section 5(ii) says that the Hindu Succession Act shall not apply, *inter alia*, to 'any estate which descends to single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Govt. of India or by the terms of any enactment passed before the commencement of this Act'. Therefore, u/s 4 any custom or usage under which a property devolved by the rule of primogeniture would stand abolished. This, however, will not be the case if under any covenant or agreement between the Ruler of any Indian State and the Govt. of India, the estate descends to a single heir, or unless there is an enactment passed before the commencement of Hindu Succession Act which provides for descent of any property to a single heir. In the present case, therefore, even if we assume that the property was held by Maharaja Rajendrasinghji in his lifetime as an impartible estate and is liable to devolve by the rule of primogeniture, on coming into force of the Hindu Succession Act, such custom or usage would stand

abolished. Devolution of the property would be governed by section 6 read with section 8. We have not been shown any such covenant. Nor is there any enactment passed before the commencement of the Hindu Succession Act which provides for such devolution of the Rajpipla palace. The Tribunal, therefore, has rightly held that unless the department can establish that in law the said property devolved by primogeniture on the death of Rajendrasinghji the law requires that the property should be considered as passing by succession under the Hindu Succession Act. The question in is answered as follows :

(i) The income arising from the property called Rajpipla palace was the income of the HUF of which H.H. Rajendrasinghji was the karta and was not the income of H.H. Rajendrasinghji as an individual for the A.Y. 1963-64. For the A.Ys. 1964-65 to 1971-72 and A.Ys. 1973-74, 1974-75 and 1976-77, the income arising from this property was the income of HUF of which H.H. Raghubirsinghji was the karta to the extent that this income arose from his interest in the said property derived by virtue of his membership of the HUF of H.H. Rajendrasinghji as a coparcener. The income arising from this property to the extent that the income arose from his interest in the property as an heir of H.H. Rajendrasinghji under Hindu Succession Act, was the income of H.H. Raghubirsinghji as an individual.

(ii) The Hon'ble court answered the question in the estate duty reference in the affirmative and in favour of the accountable person.

Cases referred to :

1. *CWT vs. Chander Sen* (1986) Taxation 82 (2) - 58, (1986) 161 ITR 370 (SC)
2. *CIT vs. P.L. Karuppan Chettiar* (1992) 197 ITR 646 (SC)
3. *CIT vs. Her Highness Maharani Vijaya Raje Scindia* (1993) 113 CTR 452 (Bom.)

Full text of the Judgment is given below :

JUDGMENT

(Mrs. Sujata Manohar, J.)

All these references under the Income-tax Act, 1961 and under the Estate Duty Act, 1953 raise a common question relating to a certain property, *viz,* Rajpipla palace, left by His Highness Rajendrasinghji, Maharaja of Rajpipla (deceased). Maharaja Rajendrasinghji of Rajpipla died on or about 2-2-1963 before the end of the accounting period relevant to the assessment year 1963-64. Income-tax return for the assessment year 1963-64 has been filed by his son Raghubirsinghji in his capacity as a legal heir of late Maharaja Rajendrasinghji. Income-tax returns for the subsequent assessment years are filed by Raghubirsinghji. The years of assessment which are involved in Income-tax Reference No. 152 of 1978 are assessment years 1963-64

and 1964-65 to 1971-72 for which previous years ended on 31-3-1963, and 31st of March in each succeeding year up to 31-3-1971. Income-tax Reference No. 57 of 1983 raises the same question in respect of succeeding assessment years 1973-74, 1974-75 and 1976-77. Estate Duty Reference No. 1 of 1977 relates to the same property as forming a part of the estate left by the deceased Maharaja Rajendrasinghji. It is necessary to refer in brief to the family history of Maharaja Rajendrasinghji of Rajpipla insofar as it is relevant for the purpose of these references.

The deceased Maharaj Rajendrasinghji of Rajpipla State was the elder son of his father H.H. Maharaja Vijaysinghji. Maharaja Vijaysinghji had two Indian wives and one English wife. Apart from the deceased Rajendrasinghji, Maharaja Vijaysinghji had two sons Pramodsinghji and Indrasinghji from his Indian wives. He also had one son Rajsinghji from his English wife Elladevi. Vijaysinghji had executed a will in England on 4-9-1946 under which he had bequeathed certain properties outside India to his English wife. Thereafter, he revoked the will and made another will in England dated 10-11-1948 bequeathing certain properties outside India to his English wife and his son by his English wife. Maharaja Vijaysinghji also executed a will in India at Bombay on 9-1-1949 in respect of his properties and assets in the then Dominion of India and at any other place except the United Kingdom, the United States of America, France and Switzerland.

On the death of Vijaysinghji a petition was filed by one Indrajitsinghji, one of his sons, in High Court of Judicature at Bombay being petition No. 1A of 1952 seeking a direction that the Administrator General of Bombay should apply for Letters of Administration-*cum*-Testament *Annexo* in respect of the properties and credits of Vijaysinghji and to collect and take possession of the same. This became necessary in view of the fact that the Official Trustees under the Bombay will of 91-1-1949 renounced executership. This petition was ultimately dismissed; whereupon Indrasinghji filed Petition No. 318 of 1953 in the Bombay High Court for Letters of Administration-*cum*-Testament *Annexo* in respect of the Bombay will of 9-1-1949. Maharaja Rajendrasinghji filed a Caveat in these proceedings. He also filed a suit in this High Court being Suit No. 939 of 1953 for a declaration that succession to all the properties and assets of his father Vijaysinghji was governed by the rule of primogeniture and he (Rajendrasinghji) was entitled to all the said properties, assets and credits. In the alternative he prayed that if it was held that the properties, assets and credits were not governed by the rule of primogeniture, then these should be duly administered by the Court, having due regard to the testamentary dispositions as were held to be valid or effective in law or is in the alternative on the footing of intestacy.

During the pendency of the proceedings filed by Indrasinghji for Letters of Administration, the suit filed by the deceased, namely, Suit No. 939 of 1953 came to be settled between all the heirs of Vijaysinghji by virtue

of two sets of consent terms which were filed in Court. The first set of consent terms was between the deceased Rajendrasinghji and Maharani Padmini Kooverba, one of the widows left by Vijaysinghji. These consent terms are of 23-8-1955 under which certain properties were given to Maharani Padmini Kooverba.

Thereafter, as a result of another settlement arrived at between the deceased and the remaining heirs of Vijaysinghji, the entire suit came to be settled and this was under the consent terms of 28-1-1957. The detailed dispositions made under the consent terms of 28-1-1957 have been set out in the order of the Tribunal dated 9-8-1974 in Estate Duty Application No. 123 (Bom.) of 1969-70 which is annexed as Exhibit "C" in Income-tax Reference No. 152 of 1978. What is relevant to note is that certain properties specified in those consent terms were given to the heirs of Vijaysinghji as set out therein. For example, Pramodsinghji, one of the sons of Vijaysinghji, was declared absolutely entitled to an immovable property known as 'Rajendra Villa' at Rajpipla together with all furniture, fixtures and movables lying therein, and so on. The remaining or residuary property came to the share of the deceased Rajendrasinghji. The consent terms provided that none of the other heirs will have any right, title or interest in respect of the remaining property as also in respect of the Privy Purse that was being received by Rajendrasinghji and which may be received by his successors to the Rajpipla State and its '*Gadi*' as well as any other properties movable or immovable whatsoever.

As a result, the deceased Rajendrasinghji became the owner of the properties left by his father Vijaysinghji other than those given over to the defendants in the said suit. One of the properties which so came to him under the consent terms was the Rajpipla palace. He also became entitled to the Privy Purse which he was already receiving.

In the estate duty proceedings arising on the death of Rajendrasinghji in February 1963, the accountable person claimed that the properties both movable and immovable which were received by the deceased Rajendrasinghji on the death of his father late Maharaja Vijaysinghji under the consent decree of 28-1-1957 as well as any other property belonging to the deceased Rajendrasinghji at the time of his death, were the properties of the HUF of the deceased, with the deceased as the karta. This contention of the accountable person has been upheld by the Tribunal in estate duty proceedings by its order dated 9-8-1974. In respect of this order in the estate duty proceedings the following question has been referred to us under section 64(1) of the Estate Duty Act :

> "Whether, on the facts and in the circumstances of the case, the properties in question, which came to the deceased from his father by virtue of the consent decree dated 28-1-1957, are governed by the law of succession and the said properties are the joint Hindu family properties and not the personal properties of the deceased ?"

Raghubirsinghji the son of the deceased Rajendrasinghji as the legal heir of the deceased Rajendrasinghji, filed his income-tax return for the assessment year 1963-64 as Rajendrasinghji died during the relevant accounting year for the assessment year 1963-64. The income-tax returns for the other assessment years which are under consideration before us in these references, have been filed by Raghubirsinghji. In the income-tax return for the assessment year 1963-64 the income from the Rajpipla palace as also certain other incomes were returned as the income of the HUF of the deceased Maharaja Rajendrasinghji. In the subsequent assessment years the income from Rajpipla palace is shown as of the HUF of Raghubirsinghji.

This was not acceptable to the ITO who, in his assessment orders, held that the entire income was the individual income of the deceased Maharaja Rajendrasinghji for the assessment year 1963-64, and of Raghubirsinghji for the subsequent assessment years in question. Ultimately, the Tribunal, however, has, on the basis of the judgment and order of the Tribunal in estate duty proceedings, held that the income, *inter alia*, from Rajpipla palace will have to be considered as income of the HUF of the deceased Maharaja Rajendrasinghji for the assessment year 1963-64 and of the HUF of Raghubirsinghji for the subsequent assessment years in question.

From these findings of the Tribunal the following question has been referred to us for determination in Income-tax Reference No. 152 of 1978:

> "Whether, on the facts and in the circumstances of the case, income arising from the property called 'Rajpipla Palace' was the income of the HUF of which H.H. Rajendrasinghji was the karta and was not the income of H.H. Rajendrasinghji for the assessment year 1963-64 and whether for the assessment years 1964-65 to 1971-72 the income arising from this property was the income of the HUF of which H.H. Raghubirsinghji was the karta and was not the income of H.H. Raghubirsinghji?"

The following question has been referred to us for determination in Income-tax Reference No. 57 of 1983:

> "Whether, on the facts and in the circumstances of the case, the income arising from the property called 'Rajpipla Palace' is the income of the HUF of which the assessee H.H. Raghubirsinghji is the karta and is not the income of the assessee?"

In order to decide these questions it is necessary for us to examine the nature of the property in the hands of Maharaja Vijaysinghji, the father of the deceased Rajendrasinghji and thereafter the nature of the property in the hands of the deceased Maharaja Rajendrasinghji—the property being Rajpipla palace. We are not concerned with other properties in these references. It is contended on behalf of the department by Mr. Khatri that Rajpipla palace was an impartible estate which devolved on Maharaja Rajendrasinghji under the rule of primogeniture. In support of this contention,

however, Mr. Khatri has not been able to show us any material from the record before us. In the order of the Tribunal in the estate duty application, the Tribunal, after examining all the facts, has given a finding to the effect that there is no evidence whatsoever to prove that the succession, *inter alia*, to Rajpipla palace was governed by the rule of primogeniture or that the property constituted an impartible estate as urged by the revenue. Therefore the contention of the department has no factual basis.

No custom establishing succession by primogeniture for the said property can be spelt out from the material which is before us. Mr. Khatri relied upon the observations made in one of the wills of Maharaja Vijaysinghji to the effect that the rule of primogeniture would not apply to his properties. We do not see how these observations in any way establish that the rule of primogeniture was applicable to the devolution of Rajpipla palace. From the facts which we have set out earlier, it is clear that Vijaysinghji treated all his properties including the Rajpipla palace as his private property in respect of which he made various wills. His English will was probated. But it does not relate in any manner to succession to the Rajpipla palace. The Indian will of Vijaysinghji was not probated. It was as a result of the consent decree passed in Suit No. 939 of 1953, dated 28-1-1957 that Rajendrasinghji, as the heir of his father Vijaysinghji, became entitled to the Rajpipla palace. The said property, therefore, came into the hands of the deceased Rajendrasinghji in his capacity as an heir of his deceased father as a result of the settlement arrived at between him and other heirs of his deceased father.

In these circumstances, since the deceased Rajendrasinghji inherited this property as an heir of his father who died prior to the coming into force of the Hindu Succession Act, 1956, this property will have to be considered as HUF property in his hands. The property developed on him on the death of his father in April 1951 before the coming into force of the Hindu Succession Act. Hence, provisions of Hindu law as applicable prior to the coming into force of the Hindu Succession Act will have to be applied. Rajpipla palace, therefore, will have to be considered as HUF property in the hands of Rajendrasinghji during his lifetime.

Deceased Rajendrasinghji died on 2-2-1963. Since this is after coming into force of the Hindu Succession Act, devolution of Rajpipla palace is governed by section 6 of the Hindu Succession Act, 1956. From the facts on record, it clear that Rajendrasinghji, on his death, left behind, apart from his son Raghubirsinghji, also his widow and two daughters. Under section 6 of the Hindu Succession Act ordinarly, when a male Hindu dies after the commencement of the Hindu Succession Act, having at the time of his death interest in Mitakshara coparcenary property, his interest in the property would devolve by survivorship upon the surviving members of the coparcenary. But this is not so when he leaves behind female relatives specified in Class I of the Schedule to the Hindu Succession Act. Widow

and daughters are such female relatives. In that case, the interest of the deceased in Mitakshara coparcenary property shall devolve by the testmentary or intestate succession, as the case may be, under the Hindu Succession Act and not by survivorship. Therefore, in the present case on the death of deceased Rajendrasinghji, his interest, *inter alia*, in the Rajpipla palace would devolve by intestate succession under the Hindu Succession Act, as the deceased Rajendrasinghji did not leave behind any will.

In this connection a reference may be made to a decision of the Supreme Court in the case of *CWT vs. Chander Sen* (1986) 161 ITR 370. The Court in that case was concerned with the nature of the property for the purpose of wealth-tax. The Supreme Court observed that it would be difficult to hold today that property which devolved on a Hindu male under section 8 of the Hindu Succession Act would be HUF property in his hands *vis-a-vis* his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property *vis-a-vis* their sons, and the female heirs with respect to whom no such concept could be applied or contemplated. The Supreme Court, therefore, held that the property which devolved on the son under section 8 would be his absolute property and would not be joint Hindu family property *vis-a-vis* his own son.

This judgment of the Supreme Court has been followed in the subsequent case of the *CIT vs. P.L. Karuppan Chettiar* (1992) 197 ITR 646. In this case, the Supreme Court considered the case of the deceased who, with his wife, sons and daughter constituted a HUF at the time of his death. His heirs including his son succeeded to the properties left by the deceased under section 8. The question was whether the income from the property coming to the son on the death of the deceased should be assessed as the income of the joint family of the son. The Supreme Court held that the income from the property which was inherited by the son on his father's death was not assessable as income of the joint family.

Ratio of these cases would apply to the present case also and the share in the Rajpipla palace inherited by Raghubirsinghji under section 8 on the death of Maharaja Rajendrasinghji cannot be considered as HUF property in his hands. Therefore, income from such share in Rajpipla palace will have to be considered as his individual income.

We have to consider the nature of the interest of Raghubirsinghji in the Rajpipla palace. As Rajpipla palace was a property belonging to the HUF of Rajendrasinghji, Raghubirsinghji had an interest in the said property by virtue of his being a coparcener in the said HUF. But in respect of the interest of Rajendrasinghji in the said HUF property, a portion of which devolved by intestate succession on Raghubirsinghji under the Hindu Succession Act, Raghubirsinghji would be entitled to it as an individual inheriting the property u/s 6. The income, therefore, which accrues to Raghubirsinghji in respect of the said property will have to be proportionately divided and

a portion considered as income of the HUF and the remaining income as income of Raghubirsinghji as an individual. The division of income will have to be in the same proportion as the HUF interest of Raghubirsinghji in the said property and his individual interest in the said property which he inherited from his father under the Hindu Succession Act.

For the above purpose, the share of Raghubirsinghji in the said property as a coparcener in the HUF of Rajendrasinghji as also his share in the said property as the heir of Rajendrasinghji under the Hindu Succession Act, shall be worked out by the Tribunal when the matter goes back to the Tribunal for giving effect to our order and the share of Raghubirsinghji in the income of the said property shall be worked out accordingly.

Since it is strenuously urged before us by Mr. Khatri that Rajpipla palace must be considered as having devolved by primogeniture on Raghubirsinghji we will also consider the situation which arose in this case on the death of Rajendrasinghji. In the first place, as the Rajpipla palace had not devolved on Maharaja Rajendrasinghji by primogeniture, it cannot devolve on Raghubirsinghji by primogeniture, after the death of Rajendrasinghji. We will assume for the sake of argument, however, that the property in the hands of Rajendrasinghji was an impartible estate which had previously devolved on him by primogeniture. However, on the coming into force of *the Hindu Succession Act*, the position altered materially. Under section 4 of the Hindu Succession Act, save as otherwise expressly provided in the Act, any custom or usage, *inter alia*, as part of the Hindu law then in force immediately before the commencement of this Act shall cease to have effect with respect of any matter for which provision is made in this Act. Section 5, however, has carved out certain exceptions. Section 5(ii) says that the Hindu Succession Act shall not apply, *inter alia*, to 'any estate which descends to single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Govt. of India or by the terms of any enactment passed before the commencement of this Act'. Therefore, u/s 4 any custom or usage under which a property devolved by the rule of primogeniture would stand abolished. This, however, will not be the case if under any covenant or agreement between the Ruler of any Indian State and the Govt. of India, the estate descends to a single heir, or unless there is an enactment passed before the commencement of Hindu Succession Act which provides for descent of any property to a single heir. In the present case, therefore, even if we assume that the property was held by Maharaja Rajendrasinghji in his lifetime as an impartible estate and is liable to devolve by the rule of primogeniture, on coming into force of the Hindu Succession Act, such custom or usage would stand abolished. Devolution of the property would now be governed by section 6 read with section 8. The Department, therefore, in order to succeed, would have to show that under a covenant or agreement between the ruler of the Rajpipla State with the Government of India there was a provision for devolution

of Rajpipla palace as an impartible estate to a single heir. We have not been shown any such covenant. Nor is there any enactment passed before the commencement of the Hindu Succession Act which provides for such devolution of the Rajpipla palace. We may refer in this connection to a decision of the Division Bench of this Court in the case of *CIT vs. Her Highness Maharani Vijaya Raje Scindia* (1993) 113 CTR (Bom.) 452. The Division Bench has considered in *extenso* the terms of the covenant dated 22.4.1948 between the Ruler in that case and the Government of India and has come to the conclusion that the covenant does not indicate that the estate stands guaranteed to a single heir by it[illegible] [illegible]evant terms of the covenant in our case are substantially s[illegible] [illegible] Division Bench in that case also considered in the effect of sections 4(1) and 5(ii) and held that in the absence of any covenant as set out in section 5(ii) or any enactment as set out therein, the property would devolve under the provisions of the Hindu Succession Act. The Division Bench, however, did not consider in that case the effect of proviso to section 6 dealing with devolution of the estate when there is a female heir in Class I, as the question does not appear to have been raised (or it may not have arisen) in that case.

The Tribunal, therefore, has rightly held that unless the department can establish that in law the said property devolved by primogeniture on the death of Rajendrasinghji the law requires that the property should be considered as passing by succession under the Hindu Succession Act. In the premises we answer the questions as follows :

(1) The question in Income-tax Reference No. 152 of 1978 and Income-tax Reference No. 57 of 1983 is answered as follows:

(i) The income arising from the property called Rajpipla palace was the income of the HUF of which H.H. Rajendrasinghji was the karta and was not the income of H.H. Rajendrasinghji as an individual for the A.Y. 1963-64. For the A.Ys. 1964-65 to 1971-72 and A.Ys. 1973-74, 1974-75 and 1976-77, the income arising from this property was the income of HUF of which H.H. Raghubirsinghji was the karta to the extent that this income arose from his interest in the said property derived by virtue of his membership of the HUF of H.H. Rajendrasinghji as a coparcener. The income arising from this property to the extent that the income arose from his interest in the property as an heir of H.H. Rajendrasinghji under Hindu Succession Act, was the income of H.H. Raghubirsinghji as an individual.

(2) We answer the question in the estate duty reference in the affirmative and in favour of the accountable person.

In the circumstances of the case, there will be no order as to costs.

(1995) 126 Taxation 12 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before the Hon'ble Mr. Justice Ajit K. Sengupta &
Hon'ble Mr. Justice Shyamal Kumar Sen)

Reference Application Nos. 612 of 1992 & 165 of 1991

Commissioner of Income-tax
vs.
R.M. Investment & Trading Co. (P) Ltd.

Deci[illegible] [illegible]9-7-1993

[illegible] our order an

DISALLOWA[illegible] [illegible] [illegible]XPENDITURE — A director in a company entering into an agreement with a company to act as an adviser and consultant for rendering services for promotion of sales of Boeing Aircrafts — Director being paid remuneration for acting as adviser and consultant rendering specific and valuable services — Revenue disallowing claim u/s 40(c) — Held, a director can have transaction with a company in the capacity other than a director — Payment made for specific and valuable services rendered — Provisions of sections 40(c) not applicable.

Income-tax Act, 1961 — Section 40(c).

FACTS

This reference relates to the income-tax assessment of the assessee company for the A.Y. 1984-85. At all material time, the principal business of the assessee company was to render consultancy services to Boeing company of USA for promotion of their sales of various types of aircrafts as per agreement. In return, the assessee company was to receive commission on sale of aircrafts. The Boeing company of USA used to remit substantial amount to the assessee company as service charges in order to enable the assessee company to meet various overhead expenses in canvassing sale of aircrafts in any particular year. During the calendar year 1983, the assessee company received service charges amounting to Rs. 25,50,0[illegible]/- from the Boeing company of USA. The assessee company claimed various expenses against the service charges so received. One such expenditure as claimed by the assessee company was payment of consultancy fee of Rs 7,25,000/- to Shri K.N. Tapuria in terms of an agreement entered into by the assessee company with Shri Tapuria on 19-1-1993. In fact, Shri Tapuria was also appointed as one of the directors of the assessee company on that very day on which the agreement for payment of consultancy fee was entered into by the assessee company with him. The ITO applying the provisions of section 40(c)(i) of the Act, disallowed a sum of Rs. 6,53,000/- being the excess of the consultancy fee paid to Shri Tapuria, a director of the assessee company, in excess of Rs. 72,000/-, the statutory limit laid down in that section. On appeal by the assessee before the CIT(A), it was

contended on behalf of the assessee company that Shri Tapuria was paid the consultancy fee of Rs. 7,25,000/- not in his capacity as the director of the assessee company but as a adviser for rendering specific services to the Boeing company. Such payment, according to the assessee company, was not covered by section 40(c)(i) and the same could at the best have been considered by the ITO u/s 40A(2)(a) of said Act. It was explained to the CIT(A) that in the later half of the year 1982, the assessee company received information that the Boeing company of USA was in need of some experienced consultancy services in India for providing them necessary assistance with regard to the promotion of their sales of various types of Boeing aircrafts. Shri Tapuria in pursuance of the agreement dated 19-1-1983 worked as adviser and consultant and rendered various services to the Boeing company for and on behalf of the assessee company. The CIT(A) was, therefore, of the view that section 40(c)(i) was not applicable in regard to the payment of Rs. 7,25,000 made by the assessee company to Shri Tapuria.

DECISION

It is judicially settled that a director may have transactions with a company in his capacity other than that of director. Such dual capacities are not alien to the concept of the corporate entity of the company and its relation with its directors. Where the director deals with the company not as a director but as a person otherwise than in his role as a director, the provision of section 40(c) shall not touch such transaction. Here, the question is not a question of excessiveness or unreasonableness. The question is whether the consultant with whom the company entered into an independent contract for rendering consultancy service as an expert could be said to have received the same consultancy fee paid to him by the company as director's remuneration after his appointment as a director. His becoming a director does not alter his original character as the consultant to the company rendering services as such. It is admitted fact that the retention of Mr. Tapuria was a necessary condition of the agreement which the foreign party entered into with the assessee company. His appointment as a director, therefore, could be said to be a step taken by the company towards ensuring direct and closer association with Mr. Tapuria who is pivotal to the entire business of the company. The fact that the same amount of consultancy fee was to be paid to him even if he was not brought in as the director clearly shows that the fee paid has nothing to do with his holding the office of directorship. The appointment as director would have conceivably the only object of securing the consultant as an insider as well as to eliminate the element of uncertainty for the success of the business but whatever further benefit or services the company received by having M. Tapuria as a director is not in effect remunerated by any extra sum. This is also a point that the payments received by him from the company was not for the services that he rendered as its director but as its consultant which the company would

have to pay even without his appointment as a director. In this view of the matter the question referred by the Tribunal was answered by the Hon'ble Court in the affirmative and in favour of the assessee.

Case referred to :

Bharat Beedi Works (P) Ltd. vs. CIT (C.A. No. 1452 of 1987)

Full text of the Judgment is given below :

JUDGMENT

(Ajit K. Sengupta, J.)

In this reference made at the instance of the revenue the following question has been referred by the Tribunal for the opinion of this Court under section 256(1) of the Income-tax Act, 1961 ('the Act') :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the consultancy fee of Rs. 7,25,000 paid by the assessee-company to Shri K.N. Tapuria, a director of the company, did not fall within purview of the section 40(c)(i) of the Income-tax Act, 1961 and thereby deleting the addition of Rs. 6,53,000 made by the Assessing Officer to the total income of the assessee?"

This reference relates to the income-tax assessments of the assessee-company for the previous year, being the calendar year 1983 corresponding to the assessment year 1984-85. At all material time, the principal business of the assessee-company was to render consultancy services to Boeing company of USA for promotion of their sales of various types of aircrafts as per agreement. In return, the assessee-company was to receive commission on sale of aircrafts. The Boeing company of USA used to remit substantial amount to the assessee-company as service charges in order to enable the assessee-company to meet various overhead expenses in canvassing sale of aircrafts in any particular year.

During the calendar year 1983, the assessee-company received service charges amounting to Rs. 25,50,000 from the Boeing company of USA. The assessee-company claimed various expenses against the service charges so received. One such expenditure as claimed by the assessee-company was payment of consultancy fee of Rs. 7,25,000 to Shri K.N. Tapuria in terms of an agreement entered into by the assessee-company with Shri Tapuria on 19-1-1983. In fact, Shri Tapuria was also appointed as one of the directors of the assessee-company on that very day on which the agreement for payment of consultancy fee was entered into by the assessee-company with him. The ITO applying the provisions of section *40(c)(i) of the Act*, disallowed a sum of Rs. 6,53,000 being the excess of the consultancy fee paid to Shri Tapuria, a director of the assessee-company, in excess of Rs. 72,000, the statutory limit laid down in that section. *On appeal by* the assessee before the Commissioner (Appeals), it was contended on behalf of the assessee-company that Shri Tapuria was paid the consultancy fee

of Rs. 7,25,000 not in his capacity as the director of the assessee-company but as an adviser for rendering specific services to the Boeing company. Such payment, according to the assessee-company, was not covered by section 40(c)(i) and the same could at best have been considered by the ITO under section 40A(2)(a) of the said Act. It was explained to the Commissioner (Appeals) that in the later half of the year 1982, the assessee-company received information that the Boeing company of USA was in need of some experienced consultancy services in India for providing them necessary assistance with regard to the promotion of their sales of various types of Boeing aircrafts. The assessee-company found that Shri K.N. Tapuria at Calcutta had considerable experience in the aforesaid line of business and had also good contact with the officials of the Boeing company in the USA. In view of the keen competition, the assessee-company approached Shri Tapuria for negotiating with the Boeing company on its behalf. Shri Tapuria started negotiations with the Boeing company. Subsequently the assessee-company was informed by the Boeing company that it was keen to secure the personal services of Shri Tapuria as a consultant and adviser and if the assessee-company was able to secure the personal services of Shri Tapuria along with the services of other personnel, the Boeing company was prepared to appoint the assessee-company as its agent in India for promoting the sale of various types of Boeing aircrafts. On this understanding, the assessee-company was able to secure from the Boeing company through Shri Tapuria a draft of the agreement to be executed between the assessee-company and the Boeing company of USA containing the board terms and conditions. At this stage the assessee-company entered into an agreement with Shri Tapuria on 29-1-1983 under which Shri Tapuria agreed to guide and advise the Boeing company on behalf of the assessee-company in promotion of the sale of various types of Boeing aircrafts in India. Shri Tapuria agreed to render all possible assistance to the Boeing company on the assessee's behalf in carrying out negotiations with various prospective purchasers including Air India and Indian Airlines in connection with sale of Boeing aircrafts. Shri Tapuria was also appointed as director of the assessee-company on the same date, i.e. 19-1-1983. This was done with a view to enabling Shri Tapuria to finalise the negotiation with the Boeing company and execute a formal agreement with them on behalf of the assessee-company. It was clearly understood that Shri Tapuria would be able to secure a final agreement with the Boeing company within April 1983 and with retrospective effect from 1-1-1983 as was originally proposed by the Boeing company. On 7-2-1983, the assessee-company wrote to the Boeing company confirming, *inter alia*, that it will be possible for the assessee-company to secure and provide to the Boeing company personal services of Shri Tapuria including the benefit of his vast experience and skill in this line of business. Shri Tapuria negotiated with the Boeing company on behalf of the assessee-company and the final agreement with the Boeing

company was signed by Shri Tapuria on behalf of the assessee-company on 15-4-1983. Under this agreement the assessee-company was appointed as the agent of the Boeing company for promotion and sale of different types of Boeing aircrafts manufactured by them in USA.

Shri Tapuria in pursuance of the agreement dated 19-1-1983 worked as an adviser and consultant and rendered various services to the Boeing company for and on behalf of the assessee-company. Shri Tapuria had to visit frequently Delhi and Bombay where the headquarters of Air India and Indian Airlines are located and also undertook several trips to Europe and USA. At the specific request of the Boeing company, Shri Tapuria had to devote substantial attention in connection with specific services rendered by him to the Boeing company for and on behalf of the assessee-company. It was because of the valuable services rendered by Shri Tapuria that the assessee-company was able to renew its agreement with the Boeing company from time to time in subsequent year. In fact, the Boeing company again addressed a letter to the assessee-company on 15-2-1986 appreciating the valuable services rendered by Shri Tapuria and stating very clearly that in case of further renewal of their agreement, they would like to ensure that personal services of Shri Tapuria would continue to be available to them for and on behalf of the assessee-company. On the basis of the aforesaid facts, the Commissioner (Appeals) came to the conclusion that it was entirely through the efforts of Shri Tapuria that the assessee-company was able to make the agreement with the Boeing company and that Shri Tapuria rendered the personal services to the assessee-company as an adviser and consultant without which the assessee-company would not have been able to receive service charges amounting to Rs. 25,50,000 from the Boeing company during the relevant previous year. The Commissioner (Appeals) was of the view that the payment of Rs. 7,25,000 made by the assessee-company to Shri Tapuria was made to him not in his capacity as a director of the company but solely for his being adviser and consultant and for rendering such services to the Boeing company for and on behalf of the assessee-company. The appointment of Shri Tapuria as a director on 19-1-1983 was only for the sake of convenience to enable him to finalise the negotiations and execute the final agreement for and on behalf of the assessee-company under which the Boeing company paid Rs. 25,50,000 to the assessee-company for rendering various services. The Commissioner (Appeals) noted that the object of section 40(c) is to prevent the directors from misusing their influence over the company to their advantage. He noted that Shri Tapuria was not a director of the company when negotiations were made with him for rendering specific services to the Boeing company. The Commissioner (Appeals) also noted that the assessee-company did not pay any remuneration to any of its other directors for looking after the day-to-day business of the assessee-company. The Commissioner (Appeals) was of the opinion that the assessee-company was able to enter into

consultancy agreement with the Boeing company of USA only because it was able to ensure the personal services of Shri Tapuria as an adviser and consultant being made available to the Boeing company. The Commissioner (Appeals) felt that the payment of Rs. 7,25,000 to Shri Tapuria was not an ordinary payment in his capacity as a director of the company but it was a specific payment for certain special services rendered by him as an adviser and consultant to the Boeing company. The Commissioner (Appeals) was, therefore, of the view that section 40(c)(i) was not applicable in regard to the payment of Rs. 7,25,000 made by the assessee-company to Shri Tapuria. The Commissioner (Appeals) thereafter proceeded to consider whether the payment of Rs. 7,25,000 to Shri Tapuria could be disallowed under section 40A(2)(a). The Commissioner (Appeals) noted that the question or reasonableness of the quantum of any expenditure has to be judged from the point of view of a prudent businessman and not by any subjective consideration. It was seen in this case that the payment had been made by the assessee-company to Shri Tapuria with a view to getting consultancy. Having regard to the fact that the assessee-company may not have been able to secure the consultancy contract with the Boeing company without the personal services of Shri Tapuria, the Commissioner (Appeals) held that the payment of Rs. 7,25,000 to Shri Tapuria could not be said to be unreasonable and/or excessive having regard to the legitimate business needs of the assessee-company and the benefits derived by the assessee-company by incurring such expenditure. He, therefore, held that such payment of Rs. 7,25,000 was also not hit by the provisions of section 40A(2)(a). On appeal by the revenue before the Tribunal the order passed by the Commissioner (Appeals) was upheld.

We find that the facts as recorded by the Commissioner (Appeals) and which have been upheld and reiterated by the Tribunal have not been challenged in this reference by the revenue. Section 40(c) applies in the case of companies only. This section has since been deleted by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989. Prior to its omission clause (c) of section 40 empowered the ITO to disallow the whole or part of any expenditure incurred by a company, which resulted directly or indirectly in the provision or any remuneration, benefit or amenity, to a director or to a person who had a substantial interest in the company or to a relative of the director or of such person, if in the opinion of the ITO any such expenditure is excessive or unreasonble having regard to the legitimate business needs of the company and the benefit derived by or accruing to it therefrom. The opinion should be found objectively from the point of view of a prudent businessman and after taking into account the statutory criteria and all relevant circumstances, and should not be influenced by immaterial considerations. The ITO may under this clause disallow the expenditure in computing the profits of the company notwithstanding that any amount so disallowed is included in the total income of the recipient.

In a case covered by this clause, the aggregate of the expenditure and allowance deductible in the assessment of the company cannot exceed Rs. 72,000 per annum. The object behind the provisions of clause (c) of section 40 was to discharge and disallow payment of high salaries and remunerations which go ill with the norms of an egalitarian society. The Supreme Court in *Bharat Beedi Works (P.) Ltd. vs. CIT* (CA No. 1452 of 1987) - (1993) 201 ITR (St.) 61 had occasions to consider the question whether payment of royalty by a company to a partnership firm, whose all the three partners were directors of the company, was hit by section 40(c). In that case it was found that under an agreement between the company and the said partnership firm, the company had taken over the bidi business and the payment of such royalty was made by the company to the firm by way of consideration for allowing the company to use the brand name belonging to the firm. The Court found that the genuineness or the validity of the agreement between the assessee-company and the firm was not disputed. The Supreme Court observed that so long as the agreement whereunder the said payment was made was not held to be a mere device or a mere screen, the payments in question could not be treated as payment made to the directors as directors. The payments were made by way of consideration for allowing the assessee-company to use the valuable right belonging to them, namely, the brand name. Such a payment, the Court observed, could be liable to be scrutinised under sub-section (2) of section 40A but certainly did not fall within the four corners of section 40(c).

In this case both the Commissioner (Appeals) as well as the Tribunal have found as a matter of fact that the assessee-company was able to secure consultancy agreement with the Boeing company of USA only because it was able to secure and make available to the Boeing company the personal services of Shri K.N. Tapuria. It was also found as a matter of fact that Shri Tapuria was never a director of the company. Shri Tapuria became a director of the company only on 19-1-1983 on which date the assessee-company entered into an agreement with Shri Tapuria to ensure and make available the personal services of Shri Tapuria to the Boeing company. It was clearly understood between the assessee-company and Shri Tapuria that Shri Tapuria will negotiate for and on behalf of the assessee with the Boeing company of USA and arrange to get consultancy agreement executed in favour of the assessee-company. It was under this agreement that the assessee-company was able to receive service charges of Rs. 25,50,000 in the previous year under reference and much higher amounts in the later years. It has been found as a matter of fact that the Boeing company would not have appointed the assessee-company for rendering necessary services in India unless the assessee-company was able to ensure the personal services of Shri Tapuria being made available to the Boeing company as an adviser and consultant. It is also an admitted fact that Shri Tapuria had considerable

experience in the aforesaid line of the business and had also good contact with the officials of Boeing company in the USA and it was with his personal efforts that in spite of keen competition the company was able to secure the consultancy contract for rendering various services with the Boeing company of USA. The subsequent letter of Boeing company addressed to the assessee-company on 15-2-1986 makes it quite clear that they were highly appreciative of the valuable services rendered by Shri Tapuria and they expressed their desire to further renew the agreement only on the understanding with the assessee-company to the effect that the assessee-company must ensure the continued personal services of Shri Tapuria being made available to the Boeing company. These facts found by the Commissioner (Appeals) and upheld by the Tribunal, make it quite clear that the sum of Rs. 7,25,000 was paid by the assessee-company to Shri Tapuria not in his capacity as a director of the company but as an adviser and consultant and for rendering specific and valuable services to the Boeing company of USA. Such a payment in our view does not fall within the four corners of the section 40(c). It is nobody's case that the payment of Rs. 7,25,000 was either excessive and unreasonable having regard to the legitimate business needs of the assessee-company or the benefits derived by it or accruing to it therefrom.

It is judicially settled that a director may have transactions with the company in his capacity other than that of a director. Such dual capacities are not alien to the concept of the corporate entity of the company and its relation with its directors. Where the director deals with the company not as a director but as a person otherwise than in his role as a director, the provision of section 40(c) shall not touch such transaction. Here, the question is not a question of excessiveness or unreasonableness. The question is whether the consultant with whom the company entered into an independent contract for rendering consultancy service as an expert could be said to have received the same consultancy fee paid to him by the company as director's remuneration after his appointment as a director. The answer appears to be in the negative. His becoming a director does not alter his original character as the consultant to the company rendering services as such.

He was donned with the office of directorship only for facility of operation of the agency agreement with foreign principal. Being a director and consultant, besides rendering consultancy services as per his consultancy agreement with the company, he could have the authority of dealing and negotiating with the foreign principal on behalf of the company. The source of his receipt of the consultancy fee is, however, not his relation with the company as one of its directors; the source is the consultancy agreement with the company which subsisted notwithstanding his appointment as the director.

The services rendered in his capacity as a consultant are extraneous of the

office of directorship that he has been holding. If the payment is extraneous to his function as a director, then the overall ceiling limit of Rs. 72,000 is not to operate. This principle has analogy with the principle which the Supreme Court has enunciated in *Bharat Beedi Works (P.) Ltd.'s* case (supra).

It is admitted fact that the retention of Mr. Tapuria was a necessary condition of the agreement which the foreign party entered into with the assessee-company. His appointment as a director, therefore, could be said to be a step taken by the company towards ensuring direct and closer association with Mr. Tapuria who is pivotal to the entire business of the company.

The fact that the same amount of consultancy fee was to be paid to him even if he was not brought in as the director clearly shows that the fee paid has nothing to do with his holding the office of directorship. The appointment as director would have conceivably the only object to securing the consultant as an insider as well to eliminate the element of uncertainty for the success of the business but whatever further benefit or services the company received by having Mr. Tapuria as a director is not in effect remunerated by any extra sum. This is also a pointer that the payments received by him from the company was not for the services that he rendered as its director but as its consultant which the company would have to pay even without his appointment as a director.

It is not a case that excessive generosity at the expense of the revenue as practised by some erring companies for the benefit of the directors of persons controlling their affairs, has been shown to the said director.

In this view of the matter, we answer the question referred to us by the Tribunal in the affirmative and in favour of the assessee.

There will be no order as to costs.

Shyamal K. Sen, J. - I agree.

(1995) 126 Taxation 21 (MP)

IN THE MADHYA PRADESH HIGH COURT

(Before Hon'ble Chief Justice Mr. U.L. Bhat and Hon'ble Mr. Justice M.V. Tamaskar)

M.C.C. No. 587 of 1985

Commissioner of Income-tax

vs.

M/s Udhoji Shri Kishan Das

For the Appellant : **Prem Francis**
For the Respondent : **B.L. Nema**
Decided on : 15-9-1994

REASSESSMENT — Meaning of — Assessment completed and refund of advance tax allowed — Assessee filing appeal — Assessment reduced in appeal — Assessee claiming refund u/s 214 for excess advance tax paid upto the date of assessment and thereafter claiming interest u/s 244 — Assessee's claim disallowed by revenue on the ground that refund already allowed upto the date of assessment — Subsequent revision of order by virtue of order of CIT(A) and order of reassessment — Held, order of CIT(A) merged with the order of Assessing Officer — Not a case of reassessment — Assessee entitled to interest u/s 214 upto the date of assessment and thereafter interest u/s 244.

Income-tax Act, 1961 — Sections 214 & 244.

FACTS

The dispute relates to A.Ys. 1975-76 and 1976-77. The assessee paid advance tax. On completion of assessment the advance tax found to be in excess and the assessed tax was refunded alongwith the interest. Not being satisfied, the assessee preferred the appeal and as a result thereof income was reduced. The department refunded the amount payable to the assessee. The assessee, however, claimed interest u/s 214 and 244(1A). The claim was rejected by the ITO. As regards the payment of interest u/s 244 is concerned, there is no controversy but the controversy relates only to interest which may be payable u/s 214. According to the revenue (regular assessment) means only the first assessment made and will not take the cases where such assessment has been modified in appeal and as such the claim of the assessee was refused.

DECISION

The Hon'ble Court held that there was no dispute as to the refund payable u/s 240 and sub-section (1) of Section 244 as it stood at the relevant time required that in case of refund in pursuance of an order referred to in section 240, the assessee was entitled to interest if the refund is not made within

three months. The interest contemplated in section 244(1) is interest for the period subsequent to the date of the order of assessment or appellate order. Where regular assessment has been made u/s 143(3), the nature of the assessment cannot be said to have been altered because of the intervention of the first appellate authority, second appellate authority or the revisional authority. Where any modification is made by the superior authority, it will not render the modified assessment something other than regular assessment. This view ts consistent with the scheme of refund and interest contained in sections 214 and 244 of the Act. The Hon'ble Court further held that there was nothing in the scheme of provision relating to refund and interest which justifies such a restricted meaning being given to the words 'regular assessment' occurring in Section 244(1). The Hon'ble Court, therefore, held that assessee was entitled to interest u/s 214 upto the date of assessment and thereafter interest u/s 244. The matter was decided in favour of the assessee.

Full text of the Judgment is given below :

JUDGMENT

(U.L. Bhat, C.J.)

The following question has been referred by the Income-tax Appellate Tribunal at the instance of the Revenue under sec. 256(1) of the Income Tax Act, 1961 :-

> "Whether on the facts and in the circumstances of the case, the Tribunal was correct in tnterpreting the words 'regular assessment' tn the light of the rulings of the Calcutta High Court in 106 ITR 38 and the Madras High Court in 126 ITR 1251 ?

The dispute relates to assessment years 1975-76 and 1976-77. The assessee had paid advance tax in instalments during the two accounting years. The Income-tax Officer completed assessment, determining the taxable income and found that the advance tax paid was in excess of the tax assessed. The assessee thereby became entitled to refund. Not being satisfied with the assessment orders, the assessee preferred appeal before the CIT (Appeals) who further reduced the taxable income and the tax payable, whereupon further amounts became liable to be refunded to the assessee. The department refunded the amounts payable to the assessee. He claimed interest on these amounts under Sections 214 and 244 (1A). The claim was rejected by the Income Tax Officer. In appeals filed by the assessee, the CIT (Appeals) upheld the claim of the assessee and directed the Income-tax Officer to work out the exact amount due as interest under Sections 214 and 244 of the Act. The Tribunal allowed the application filed by the Revenue for reference under Sec. 256(1) of the Act.

For both the assessment years, the assessee had paid advance tax and submitted returns and the ITO completed assessments under sec.143(3) of the Act. There was no occasion to invoke Sec. 147 or even Sec. 144.

There is no controversy about the conclusion of the Tribunal that the assessee is entitled to interest under Section 244 of the Act. The controversy relates only to the interest which may be payable under Sec. 214 of the Act.

Sub-section (1) of Section 214, as it stood at the relevant time, read as under :

> "214. *Interest payable by Government*—(1) The Central Government shall pay simple interest at twleve per cent per annum on the amount by which the aggregate sum of any instalment of advance tax paid during any financial year in which they are payable under sections 207 to 213 exceeds the amount of tax determined on regular assessment, from the 1st day of April next following the said financial year to the date of the regular assessment for the assessment year immediately following the said financial year, and where any such instalment is paid after the expiry of the financial year during which it is payable by reason of the provisions of Section 213, interest as aforesaid shall also be payable on that instalment from the date of its payment to the date of regular assessment..."

Sub-section (1) of section 214 deals with liability of the Government to pay interest from the 1st of April next following the financial year till the date of regular assessment. Interest is payable on the difference between the total advance tax paid during the financial year and the amount of the tax determined on regular assessment. Sub-section (1) of Sec. 214 can apply only in cases where there has been regular assessment. Section 2(40) of the Act defines "regular assessment" as assessment made under sec. 143 or 144. Since entitlement under Sec. 214 is restricted to cases of regular assessment and interest is payable upto the date of regular assessment, the meaning and amplitude of the words 'regular assessment' have to be appreciated. According to the Revenue, 'regular assessment' means only the first assessment made by the Assessing Officer and will not take the cases where such assessment has been modified by in appeal or second appeal. In the two assessments involved in this case, original orders of assessment were passed on 2-3-1979 and 17-3-1979 respectively and the appellate order was passed on 3-5-1980. According to the Revenue, interest is payable under Sec. 214 (1) only till 2-3-1979 and 17-3-1979 respectively while according to the assessee interest is payable till 3-5-1980.

Section 240 of the Act deals with refund on appeal or other proceedings. It states that where, as a result of any order passed in appeal or other proceeding under the Act, refund of any amount becomes due to the assessee, the Income-tax Officer shall, except as otherwise provides in this Act, refund the amount to the assessee without his having to make any claim in that behalf. Sub-section (1) of Sec. 244 as it stood at the relevant time required that in case of refund in pursuance of an order referred to in Section 240, if it is not made within a period of three months from

the end of the month in which the order in appeal was passed, the Government shall pay to the assessee simple interest at 12% per annum on the amount of refund due from the date immediately following the expiry of the period of three months, aforesaid till the date on which the refund is granted. The interest contemplated in Section 244 (1) is interest for the period subsequent to the date of order of assessment or appellate order.

Chapter XX of the Act with appeal and revision. Orders of appellate authority shall be communicated to the assessee and to the Commissioner. Where the Assessing Officer completes assessment and determines the tax payable, or exempts the person concerned from payment of tax and the order is modified by the first appellate, the second appellate or the revisional authority, it is such final order that is binding on all the parties. Where regular assessment has been made i.e. assessment has been made under Sec. 143(3) and Sec. 144 of the Act, the nature of the assessment cannot be said to have altered because of the intervention of the first appellate, second appellate or the revisional authority. Where any modification is made by the superior authority, it will not render the modified assessment...something other than regular assessment. The original assessment order made under Sec. 143(3) or 144 merges in the order of the superior authority. Whether the jurisdiction of the appellate or revisional authority has been invoked or not and if invoked, whether the superior authority has interfered or not, the assessment continue to be regular assessment within the meaning of Sec. 2(40) of the Act.

This view is consistent with the scheme of refund and interest contained in Sections 214 and 244 of the Act. The former contemplates interest payable upto the date of regular assessment while the latter contemplates interest payable during a period after passing of an order in appeal or other proceedings, that is, a future period. To hold that the words 'regular assessment' in Sec. 214 should be understood as meaning only assessment by the Assessing Officer and not as including the order modifying the assessment order by appellate or revisional authority will lead to absurd results. Take a case where the assessing authority arrives at a correct decision and fixed the taxable income at such an amount as to entitle the assessee to obtain refund of part of the advance tax paid and the order is not interfered with by the appellate or revisional authority. In such a case the assessee would be entitled to interest or the refundable amount till the date of regular assessment. Take a case where the Assessing Officer by an erroneous view of law or facts holds that tax payable is equal to the advance tax paid in which case no refund would be due and the appellate authority corrects the error committed by the Assessing Officer and reduces the quantum of taxable income in which case the assessee would be entitled to refund. If this modified assessment is to be regarded as falling outside the purview of the words 'regular assessment' the assessee would not be entitled to interest under Section 214. This would mean that where the Assessing

Officer passes a correct order, the assessee will be entitled to interest but where he passes an erroneous order which is corrected by a superior authority, the assessee would be denied interest. There is nothing in the scheme of the provisions relating to refund and interest which justifies such restricted meaning being given to the words 'regular assessment' occurring in Sec. 244(1). 'Regular assessment' means assessment under section 143(3) or 144 of the Act. Where assessment has been made under section 143(3) or 144 of the Act it is regular assessment whether the final order of assessment is the one passed by the Assessing Officer or the one passed by the Assessing Officer as modified in appeal or revision.

There is conflict of opinion among the various High Courts in regard to this controversy. The High Courts of Gujarat, Calcutta, Madras and Rajasthan have taken the view expressed by us. (See *Badolia Textile Mills vs. ITO* Circle II, Surat, 151 ITR 389 - Guj. *Chloride India Ltd. vs. CIT, West Bengal* 106 ITR 38- Cal. *T.U.G.C. Ltd. vs. CIT* 126 ITR 125-Mad. *Super Spinning Mills vs. CIT and another* 199 ITR 832- Mad.and *CIT vs. M.L. Sanghi.* 170 ITR 670-Raj. The High Courts of Bombay, Gauhati, Kerala and Andhra Pradesh have taken a contrary view. (See *CIT vs. Carona Sahu Co. Ltd.* 146 ITR 452- Bom. *Moheema Ltd. vs. CIT*, 182 ITR 377-Gau. *CIT vs. G.B. Transports* 155 ITR 543- Ker. and *Nizam's Religious Endowment Trust vs. ITO* 131 ITR 239 (A.P).

In an elaborate judgment, the Full Bench of the Gujarat High Court has adverted to the entire case law on the controversy. We are in respectful agreement with the view taken in the said decision and other decisions on the same lines.

With great respect, we are unable to agree with the contrary decisions for the reasons which we have already indicated.

The Tribunal was justified in coming to the conclusion that the assessee is entitled to interest under section 214 relying on the decisions in 106 ITR 38 and 126 ITR 125. The question referred is answered in the affirmative i.e. in favour of the assessee and against the Revenue.

A copy of this order under the signature of the Registrar and seal of the High Court shall be transmitted to the Appellate Tribunal. There shall be no order as to costs.

(1995) 126 Taxation 26 (All.)

IN THE HIGH COURT OF ALLAHABAD

(Before Hon'ble Mr. Justice R.K. Gulati & Hon'ble Mr. Justice S.C. Verma)

IT Application Nos. 281 & 282 of 1992

Commissioner of Income-tax

vs.

Smt. Prakashwati

Decided on : 10.1.1994

REVISION OF ASSESSMENT — Assessment completed u/s 143(1) — Assessment set aside by CIT u/s 263 with a direction for *de-novo* assessment — CIT holding, assessment made without making proper inquiries — Tribunal setting aside the order of the CIT in view of Board's Circular No. 4 dated 8.7.1986 and No. 176 dated 26.8.1987 — Revenue filing reference application — Reference application rejected — Held, no question of law arose — Also rejected on the ground that revenue effect less than Rs. 30,000/-.

Income-tax Act, 1961 — Sections 256(2) & 263.

FACTS

For the A.Ys. 1984-85 and 1985-86, assessments were completed u/s 143(1). The CIT set aside these assessments on the ground that proper inquiries were not made by the assessing officer and directed the ITO to frame de-novo assessment. Tribunal came to the finding that while completing wealth-tax assessment for A.Y. 1980-81 inquiries were made and even otherwise in view of the Board's circular No. 4 dated 8.7.1986 and 176 dated 26.8.1977, the assessment completed u/s 143(1) could not be subjected to any action u/s 263. The Tribunal set aside the order of the CIT. Being aggrieved, the revenue sought reference which was rejected. The revenue approached the High Court for a direction to the Tribunal to refer the case.

DECISION

The order of the Tribunal was based on facts and also in view of the instructions of the Board the Tribunal was right in holding that the assessments could not be set aside and the CIT was wrong in exercising his powers u/s 263. The Hon'ble Court further held that the revenue effect was very small and in view of the Board's circular No. 279/26/83 dated 12.7.1984 and circular No. 319/11/87 dated 14.7.1987 there was no reason to refer the case where the revenue effect was less than Rs. 30,000/-. The department's application was rejected.

Full text of the Judgment is given on next page:

JUDGMENT

(R.K. Gulati, J.)

These are two connected applications under Section 256(2) of the Income-tax Act, (for short the Act) filed at the instance of the Revenue against a common order passed by the Income-tax Appellate Tribunal, in respect of assessment years - 1984-85 and 1985-86. A common question proposed in these applications is as under :-

> "Whether in the circumstances of the case, the ITAT was legally correct to cancel the order of the CIT passed under Section 263 of the Income-tax Act?"

The assessments in respect of the above two years were completed under Section 143(1) of the Act under the "Summary Assessment Scheme" on income of Rs. 15,280/- and Rs. 17,180/- respectively. In respect of the assessment year 1984-85 the assessee was subjected to tax of Rs. 80/- while in respect of the other year a tax of Rs. 475/- was imposed. The Commissioner of Income-tax Meerut by a common order passed under Section 263 of the Act set aside the assessments for making the same *de novo* after making proper enquiries. The Commissioner was of the opinion that the impugned assessment orders were erroneous and prejudicial to the interest of the revenue, inasmuch as, the Income-tax Officer had completed the assessments without making 'proper enquiries.' On appeal, the order passed by the Commissioner of Income-tax did not find favour with the Income-tax Appellate Tribunal.

Having heard learned Counsel for the parties, we are of the opinion that the order of the Income-tax Appellate Tribunal does not give rise to any stateable question of law.

In setting aside the order of the Commissioner of Income-tax, the Income-tax Appellate Tribunal in the first instance held that in view of the Departmental instructions contained in the Board's Circular No. 4 dated 8.7.1986 and 176 dated 26.8.1987, the assessment completed under Section 143(1) could not be subjected to any action under Section 263 of the Act which, *inter alia,* provided that no remedial action is necessary for summary assessments in the cases as the revenue effect less, if any, is consciously suffered by the Government in utilising resources for scrutiny and investigation of larger cases. The Income-tax Appellate Tribunal held that the circulars of the Board being benevolent in nature, it is settled, were binding on the tax authorities including the Commissioner of Income-tax.

That apart, the Income-tax Appellate Tribunal also examined the impugned order of the Commissioner of Income-tax on merits and found that it was not sustainable on consideration of the material that existed on the record. In doing so, it recorded a finding that the enquiry contemplated by the Commissioner in his order setting aside the assessment orders, had already

been made by the Income-tax Officer when he completed the wealth tax assessment for the year 1980-81. These findings of fact recorded by the Income-tax Appellate Tribunal have not been questioned by the Revenue in the question proposed in these two applications. It is thus evident that the order of the Income-tax Appellate Tribunal rested on appreciation of the facts and material, available on the record.

There is another aspect of the matter. We have seen earlier that in these two cases the tax effect involved is very nominal, that is Rs. 80/- is for assessment year 1984-85 and Rs. 375/- for assessment year 1985-86. In *Commissioner of Wealth-tax vs. Executors of late D.T. Udeshi*, (1991) 189 ITR 319, a Division Bench of Bombay High Court rejected an application for reference where the tax effect was less than Rs. 8,500/- in year saying that no reference application could be made in view of policy decision of the Central Board of Direct Taxes not to file reference in the cases where the tax effect was less than Rs. 30,000/- per year, contained in its Circular F. No. 279/26/83 dated 12.7.1984 and Circular F. No. 319/11/1987 dated 14.7.1987. For that reason also these two applications are liable to be rejected.

In the result, these applications are without merit and are accordingly rejected. There shall be no order as to costs.

(1995) 126 Taxation 28 (All.)

IN THE HIGH COURT OF ALLAHABAD

(Before Hon'ble Mr. Justice A.P. Misra & Hon'ble Mr. Justice M.C. Agarwal)

I.T. Application No. 267 of 1991

Commissioner of Income-tax

vs.

M/s Swarup Vegetable Products

Decided on : 8.7.1994

BUSINESS EXPENDITURE — Assessee claiming deduction of contingent liability being difference in cane price actually paid and the one fixed by Govt. — Assessee not accepting the order of the Govt. — High Court staying Govt. order — Govt. filing appeal before Supreme Court — Held, liability being quantified allowable — In view of the judgment of the Supreme Court, no question of law arose.

Income-tax Act, 1961 — Sections 37 & 256(2).

FACTS

Briefly stating the facts giving rise to this application are that the assessee is a Public Limited Co. engaged in manufacture and sale of sugar,

vegetable oils, alcohol and confectionery goods through its different units. During the course of assessment proceedings it was noticed that the assessee company had, inter alia, claimed deduction of Rs. 14,77,552 towards a contingent liability. It was claimed that the said liability had arisen on account of difference in cane price actually paid by the assessee and the one fixed by the Central Govt. The assessee, however, did not pay the enhanced price and on a writ petition, succeeded in securing a decision of Hon'ble High Court, Allahabad in its favour. The Central Govt. in its turn preferred an appeal before the Hon'ble Supreme Court. Since the assessee company had not paid the difference in cane price as above and that the matter was still sub-judice, the assessing officer disallowed the claim of Rs. 14,77,552/- with the observations that the deduction on this account shall be allowable only when the matter is finally decided and the assessee actually pays the amount.

DECISION

The Hon'ble Apex Court held that the company which is following the mercantile system of accounting, can legitimately claim deduction in respect of business liability even if such liability has not been quantified or paid. In *Kedarnath Jute Manufacturing Co. vs. CIT* (1971) 82 ITR 363, the Supreme Court held that an assessee who follows the mercantile system of accounting can claim deduction u/s 10(2)(xv) in respect of a business liability before it is quantified and even if the assessee does not make a provision of such a liability in its books of account, he is still to claim deduction. Since the aforesaid decision covers the points the revenue seeks to raise, the Hon'ble Court did not find that any question for reference arose. The present application was accordingly rejected with costs.

Cases referred to :

1. *Kedarnath Jute Manufacturing Co. Ltd. vs. CIT* (1971) 82 ITR 363 (SC)
2. *CIT vs. J.K. Synthetics Ltd.* (1983) 143 ITR 771 (SC)

Full text of the Judgment is given below :

JUDGMENT

(A.P. Misra, J.)

Heard Learned Counsel for the revenue and also the Learned Counsel for the Assessee. Learned Counsel for the revenue seeks following questions to be referred by this Court :

"1. Whether on the facts and in the circumstances of the case, the ITAT was correct in law to hold that it was a clear liability and thus allowable as deduction ?

2. Whether on the facts and in the circumstances of the case the ITAT was correct in law to hold that the ratio of judgment in the case of

Kedarnath Jute Manufacturing Co. Ltd. vs. CIT, reported in (1971) 82 ITR 363 (SC) is applicable in the present case ?"

The Tribunal rejected the reference application for the same under Section 256(1) of Income-tax Act. Briefly stating the facts giving rise to this application are that the assessee is a Public Limited Co. engaged in manufacture and sale of sugar, vegetable oils, alcohol and confectionery goods through its different units. During the course of assessment proceedings it was noticed that the assessee company had, *inter alia*, claimed deduction of Rs. 14,77,552/- towards a contingent liability. It was claimed that the said liability had arisen on account of difference in cane price actually paid by the assessee and the one fixed by the Central Govt. The assessee, however, did not pay the enhanced price and on a writ petition, succeeded in securing a decision of Hon'ble High Court, Allahabad in its favour. The Central Govt. in its turn preferred an appeal before the Hon'ble Supreme Court. Since the assessee company had not paid the difference in cane price as above and that the matter was still *sub-judice*, the assessing officer disallowed the claim of Rs. 14,77,552/- with the observations that the deduction on this account shall be allowable only when the matter is finally decided and the assessee actually pays the amount. The above action of assessing officer was also sustained in first appeal before the learned CIT(A). The Tribunal vide its order dated 30.3.1990 confirmed the decision of the first appellate authority and directed to modify the deduction as per decision of the Supreme Court of India as and when received. However, the Tribunal amended this order after the assessee moved a Misc. Application and held that the liability in question was provided for on the basis of notification issued by the minister of agriculture and irrigation and therefore, is clearly as liability which is allowable. Reliance has been placed on the decision of the Supreme Court reported in the case of *Kedarnath Jute Mfg. Co. Ltd.*, 82 ITR 363.

The contention on behalf of the revenue is that earlier Tribunal rightly held the question of allowing deduction shall be subject to the decision of the Supreme Court which is pending. However, we find that the facts of this case are similar to the facts of the case reported in (1983) 143 ITR 771, *Commissioner of Income-tax, Kanpur vs. J.K. Synthetics Ltd.*, in which the following observations have been made :

"Having heard learned Counsel for the parties, we have no manner of doubt that the order passed by the Tribunal that the case was covered by the principles laid down by the Supreme Court in the case of *Kedarnath Jute Mfg. Co. Ltd. vs. CIT*. (1971) 82 ITR 363, is correct and that notwithstanding the decision of the Delhi High Court, the assessee is entitled to claim deduction in respect of the provision for payment of excise duty made by it in the relevant assessment year, inasmuch as the excise department had gone up in appeal to the Supreme Court and was questioning the correctness of that decision

> and was insisting that the assessee was liable to pay the excise duty.
>
> The company is following the mercantile system of accounting, and it can legitimately claim deduction in respect of business liability even if such liability has not been quantified or paid. In *Kedernath Jute Manufacturing Co. vs. CIT* (1971) 82 ITR 363, the Supreme Court held that an assessee who follows the mercantile system of accounting can claim deduction u/s 10(2)(xv) in respect of a business liability before it is quantified and even if the assessee does not make a provision of such a liability in its books of account, he is still to claim deduction."

Since the aforesaid decision covers the points the revenue seeks to raise, we do not find that any question for reference arose. The present application was accordingly rejected with costs.

(1995) 126 Taxation 31 (Del.)

IN THE HIGH COURT OF DELHI

(Before Hon'ble Mr. Chief Justice Gokul Chand Mital & Hon'ble Mr. Justice K. Shivashankar Bhat)

CWP Nos. 2777 & 2822 of 1986

P.P. Singh/Sunshine Travels & Tours (P.) Ltd.

vs.

Union of India

For the Appellant : **M. Sayali, P.P. Singh. Arun Jaitly, P.K. Mullick, Dhirendra Negi and Naveen Chandra**

For the Respondent : **Rajendra and D.N. Malhotra**

Decided on : 18.4.1994

ACQUISITION OF IMMOVABLE PROPERTY — S entering into an agreement on 30.4.1986 with A and other co-owners of property — Co-owners constructing a residential property and agreeing to sell a portion of building to S — Agreement providing possession of property to be given on payment of entire consideration — Agreement further providing building to be delivered to S or his nominee within a period of three years on payment of balance — On 1.5.1986 Form 37-EE filed — On 1.10.1986 Chapter XXC introduced — Order of acquisition made under provisions of Chapter XX-C on 15.12.1986 — Petitioners filing writ, questioning the validity of relevant provisions and for quashing the order — Held, right of the vendee created on execution of agreement — Part performance of contract fell within provisions of Section 53A of Transfer of Property Act — Agreement entered into prior to enforcement of Chapter XX-C — Provisions of Chapter

XX-C not applicable — Order of acquisition quashed — Only proceedings under Chapter XX-A could be initiated.

Income-tax Act, 1961— Chapters XX-A, XX-C & Section 269-C

Transfer of Property Act, 1882 — Section 53A.

FACTS

Sunshine Travels entered into an agreement on 30.4.1986 with Anil Vasudeva and others. Anil Vasudeva and others were the co-owners of the property in question. They were constructing a residential building on the said property. They are referred to as 'Sellers'. Sellers agreed to sell a portion of the building to the purchaser Sunshine Travels. The consideration had to be paid to the manner stated in the agreement out of which a sum of Rs. 50,000/- had already been paid under 4 cheques. The circumstances in which the balance was to be paid were narrated in the agreement. On 1.5.1986, Form 37EE u/s 269AB(2) of the Act, was filed. This was under Chapter XX-A. On 1.10.1986, Chapter XX-C was brought into force in Delhi. On the basis of the new Chapter XX-C an order was made on 15.12.1986, acquiring the property in question. The petitioner immediately approached the Court by filing the present writ petition on 24.12.1986. Petitioner questioned the validity of the relevant provisions of Chapter XX-C. Petitioner also sought the quashing of the order dated 15.12.1986, made under Chapter XX-C. Petitioner also sought the quashing of rule 48L of the Income-tax Rules, 1962 because it purports to making the provisions retrospective even though the Act did not declare its provisions retrospective.

DECISION

The Hon'ble Court held that having regard to the agreement and supplementary agreement there was no doubt that the possession of the property had been handed over to the vendee and he had been in enjoyment of the same. The agreement created a right in the vendee to enjoy the property. Even assuming that there was only a part performance of the contract, the said part performance was clearly the one falling within Section 53A of the Transfer of Property Act, 1882. In the circumstances it was contended that the case of the petitioner came squarely within the provisions of Section 269AB of Chapter XX-A of the Act. The concept of 'transfer' is defined in section 269A(h) in Chapter XX-A as also in section 269-UA(f) in Chapter XX-C of the Act. For the purpose of these Chapters, allowing the possession of a property to be taken or retained in part performance of a contract of the nature referred in section 53A of the Transfer of Property Act, also is considered as a transfer. The revenue, however, contends that the transfer should be a real transfer and if the agreement has not fructified by the execution of sale deed before 1.10.1986, section 269UD of the Act will be attracted. In both the writ petitions on facts, the Hon'ble Court was of the view that the agreements in question had enabled the vendees to

enjoy the respective properties or at any rate they had enabled the vendees to enjoy certain rights with respect to the properties in question and those rights are deemed to be immovable properties both under Chapters XX-A and XX-C. In view of the statutory definitions of the relevant terms in Chapters XX-A and XX-C, the Hon'ble Court had no hesitation in holding that both the agreements in these two writ petitions enabled the respective vendees to enjoy the houses to be constructed under the agreements and, therefore, constituted transfers prior to the enforcement of Chapter XX-C and that these transfers were governed by the provisions of Chapter XX-A. Consequently these writ petitions wre allowed. The orders made under Chapter XX-C for the purchase of the properties in question and consequential vesting in the Central Govt. were quashed.

Cases referred to :

1. *C.B. Gautam vs.UOI* (1993) 199 ITR 530 (SC)
2. *Rambai Manjanath Nayak vs. UOI* (1993) 116 Taxation 111; (1993) 201 ITR 422 (SC)
3. *Shantivan Corpn. vs. Sub-Registrar* (1991) 102 Taxation 166 (Guj.); (1991) 189 ITR 583 (Guj.)
4. *Chandravadan Desai vs. AA* (W.P. No. 2552 of 1988, dated 13.1.1994)
5. *Keshav Singh vs. Valuation Officer* (1992) 109 Taxation 533 (Raj.); (1992) 195 ITR 435 (Raj.)

Full text of the Judgment is given below :

JUDGMENT

(K. Shivashankar Bhat, J.)

The question involved in these two writ petitions pertains to the scope of Chapter XX-A and Chapter XX-C of the Income-tax, 1961 ('the Act'). The petitioner in C.W.P. 2822 of 1986 is referred hereinafter as 'Sunshine Travels' and the petitioner in the writ petition No. 2777 of 1986 is referred hereinafter as 'P.P. Singh'.

Sunshine Travels entered into an agreement on 30.4.1986 with Anil Vasudeva and others. Anil Vasudeva and others were the co-owners of the property in question. They were constructing a residential building on the said property. They are referred to as 'Sellers'. Sellers agreed to sell a portion of the building to the purchaser Sunshine Travels. The consideration shall have to be paid to the manner stated in the agreement out of which a sum of Rs. 50,000 has already been paid under 4 cheques, the stance in which the balance shall have to be paid are narrated in the agreement.

The following clause is quite relevant :

> "Had under any circumstances, whatsoever the possession of any portion of the building herein agreed to be acquired by the purchaser shall be

given by the seller until and unless all payments required to be made in terms of this agreement along with an interest have been fully made to the sellers."

Various other clauses as to how the building shall have to be maintained; how the taxes are to be paid ? How the increased burden shall have to be borne by the parties are not necessary for us to consider ? However, clause 15 of the agreement stated that the portion of the building agreed to be acquired by Sunshine Travels shall be transferred in their favour or in favour of their nominee within a period of 3 years from the date of the agreement on payment of the balance sum of Rs. 1 lakh agreed to be paid to the sellers under the agreement at the time of transfer.

According to the revenue the transfer of the building in favour of Sunshine Travels could take place only when this clause is satisfied. In other words when the entire amount is paid and the sale deed is registered.

On 1.5.1986, Form 37EE under section 269AB(2) of the Act, was filed. This was under Chapter XX-A. On 1.10.1986, Chapter XX-C was brought into force in Delhi. On the basis of the new Chapter XX-C an order was made on 15.12.1986, acquiring the property in question. The petitioner immediately approached this Court by filing the present writ petition on 24.12.1986. Petitioner questioned the validity of the relevant provisions of Chapter XX-C. Petitioner also sought the quashing of the order dated 15.2.1986, made under Chapter XX-C. Petitioner also sought the quashing of rule 48L of the Income-tax Rules, 1962 ('the Rules') because it purports to making the provisions retrospective even though the Act (Chapter XX-C) did not declare its provisions retrospective.

The validity of Chapter XX-C has been substantially upheld by the Supreme Court in *C.B. Gautam vs. Union of India* (1993) 199 ITR 530. Therefore, the petitioner confined the arguments as to the applications of the provisions of Chapter XX-C to the transaction in question. The petitioner contended that Chapter XX-C was not retrospective and did not apply to the agreements entered into prior to the date of its application to an area. Since the relevant agreement involved in the writ petition was entered into on 30.4.1986, the transaction would come within the provisions of Chapter XX-A.

Before considering the question of law it is necessary to note the effect of the agreement dated 30.4.1986. The sellers/owners agreed to sell a portion of the building put up by them to the petitioner, Sunshine Travels. The sale consideration shall have to be paid on various dates. However, the purchaser shall be entitled to have the building transferred in favour of the purchaser on payment of the entire sale consideration. This transfer referred in clause 15 is the transfer as normally understood for the purpose of registration, i.e., to say a transfer effected by way of a sale deed that is clear from the reading of the entire clause 15 which refers to the several formalities to be completed and the payment of transfer charges, registration

expenses and stamp duty, etc. However, the agreement proceeds on the assumption that the purchaser will be entitled to the possession of the portion of the building agreed upon to be sold to the purchaser on payment of the entire sums referred in the agreement. In other words the agreement created a right in the purchaser with respect to the building put up and this right had the effect of enabling the enjoyment of the property. At any rate the agreement certainly has the effect of transferring or enabling the enjoyment of the right with respect to the building to be put up. This aspect shall have to be borne in mind while considering the various provisions of Chapters XX-A and XX-C.

In the writ petition filed by P.P. Singh and others there was an agreement dated 9.8.1985. P.P. Singh was the Vendor under the agreement. Sushil Kumar Vohra and others were collectively called the Vendee. Vendor agreed to convey the perpetual leasehold rights in the plot of land in question along with the ownership rights in the superstructure constructed thereon. Vacant physical possession of the property was to be handed over to the vendee at the time of execution and registration of the sale deed. Thirdly, thereafter the entire consideration was paid by the vendee to the vendor and possession was handed over to the vendee. A supplementary agreement was executed on 12.8.1985 and all the payments were made by pay orders and the petitioner has produced the certificate of the bank also to substantiate the assertion that the sale consideration has been paid in terms of the supplementary agreement. The possession, as already noted, was handed over to the vendee in August 1985. Having regard to the material on record there can be no doubt that this supplementary agreement was a *bona fide* agreement entered into by the parties and the payments have been made in full and possession has been obtained by the vendee on 12.6.1985 itself. However, the appropriate authority held that the transfer was not complete and the transfer was to take place only after 1.8.1986 when Chapter XX-C came into force. He made an order on 15.12.1986, ordering the purchase on the property by the Central Government at an amount equal to the apparent consideration for the transfer of the property in question. Immediately, the petitioners approached this Court.

The short question is whether the "transfer" for the purposes of Chapter XX-A and Chapter XX-C took place prior to 1.10.1986 or thereafter.

Having regard to the agreement and the supplementary agreement there was no doubt that the possession of the property has been handed over to the vendee and he has been in enjoyment of the same. The agreement created a right in the vendee to enjoy the property. Even assuming that there was only a part performance of the contract, the said part performance was clearly the one falling within section 53A of the Transfer of Property Act, 1882. In the circumstances it was contended that the case of the petitioner came squarely within the provisions of section 269AB of Chapter XX-A of the Act.

The concept of 'transfer' is defined in Section 269(h) in Chapter XX-A as also in section 269UA(f) in Chapter XX-C of the Act. For the purpose of these chapters, allowing the possession of a property to be taken or retained in part performance of a contract of the nature referred in section 53A of the Transfer of Property Act, also is considered as a transfer.The revenue, however, contends that the transfer should be a real transfer and if the agreement has not fructified by the execution of sale deed before 1.10.1986, section 269UD of the Act will be attracted.

In both the writ petitions on facts we are of the view that the agreements in question have enabled the vendees to enjoy the respective properties or at any rate they have enabled the vendees to enjoy certain rights with respect to the properties in question and those rights are deemed to be immovable properties both under Chapters XX-A and XX-C.

To understand the concept of immovable property as well as the concept of transfer it is necessary to refer to a few provisions. However, we have confined our discussions to one aspect of the right created under a transaction referred in section 269AB(1)(b).

Section 269A(2)(e) defines the term 'immovable properties'. Its sub-clause (i) refers to the tangible immovable properties such as land or building. Sub-clause (ii) refers to certain rights which are brought into the scope of the term immovable properties; in other words, rights refused in sub-clause (ii) are also immovable properties for purposes of Chapter XX-A. To understand the said rights referred in sub-clause (ii), one has to refer to section 269AB(1)(b), as the section is worded. In other words, certain rights are to be considered as immovable properties by reading section 269A(2)(e)(ii) and section 269AB(1)(b) together and these rights are covered by section 269(2)(h)(ii) of the Act.

As per section 269AB(i)(b), *inter alia*, every transaction whereby a person acquires any rights in or with respect to any building which is to-be constructed not being a transaction by way of sale, exchange or lease of such building or part of a building which is required to be registered under the Registration Act, 1908, should be reduced to writing, etc., and be registered with the competent authority. While clause (a) of section 269AB(1) covers a transaction involving possession, as referred in section 53A of Transfer of Property Act, clause (b) spreads its net wide, to cover other kinds of transactions out of which, one transaction is a transaction whereby a person acquires any right with respect to a building to be constructed. That right with respect to a building to be constructed, is also immovable property, as this right is referred in the definition of the said term in section 269A(e)(ii). For the sake of convenience, were have limited the reference to the words in section 269AB(1)(b) to the extent of their relevance to the facts before us. Therefore, if under a transaction other than the transactions referred in the words bracketed, a person acquires a right with respect to

a building to be constructed, that right is to be considered on par with the right created by an agreement covered by section 53A of the Transfer of Property Act, because section 269AB(1)(a) ropes in transactions to which section 53A of Transfer of Property Act, applies.

The right with respect to a building to be constructed created under a transaction, as it is referred in section 269AB(i)(b) being an immovable property is dealt with in section 269(2)(h)(ii); in relation to such a right (i.e., to say, in relation to such an immovable property), transfer means *inter alia*, the doing of anything which has the effect of enabling the enjoyment of such property. In other words, if under an agreement, a right is created with respect to a building to be constructed enabling the enjoyment of the said building, the agreement is considered a transfer. The very doing of anything which has the effect of enabling the enjoyment of a building to be constructed, under a transaction, has been brought into the control of Chapter XX-A. The liability created by Chapter XX-A gets attached to such a transaction. The very transaction of that nature incurs the liability, which any other transfer incurs under Chapter XX-A.

Thus, the transaction which involves transfer of a right enabling the transferee to enjoy the building to be constructed becomes a statutory transfer for purposes of Chapter XX-A and such a transfer is exposed to the statutory steps contemplated by section 269C of the Act. If there has been under-valuation of the apparent consideration, the competent authority may initiate proceedings for the acquisition of the property under Chapter XX-A. Section 269D of the Act provides for issuance of preliminary notice within nine months of the registration of the instrument of transfer under the Registration Act, or under section 269AB. After this period of nine months, power to initiate proceedings under Chapter XX-A ceases. Other provisions provide for the filing of objections to the notice and hearing of objections, making an order of acquisition, filing of an appeal and further appeal against the order, vesting of property in Central Government, etc. Chapter XX-A is a self-contained Code governing these transfers as defined in section 269A(2)(e).

The difficulty of understanding the concept of transfer as defined in section 269A(2)(h), is the difficulty due to the abstract rights covered by the statutory definitions. If the scope of Chapter XX-A becomes clear and a transaction falls within its net, no argument is needed to conclude that Chapter XX-C would not govern such a transaction, provided the transaction is prior to the date of the coming into force of Chapter XX-C.

The width of the relevant terms referred in these two Chapters, is almost the same. The term, immovable properties defined in section 269UA(d): Sub-clause (ii) is on par with section 269A(2)(e); similarly, the concept of transfer defined as per section 269UA(f) in Chapter XX-C is broadly similar to the language employed by section 269AB(2)(h) on Chapter XX-A. The

law became more stringent under Chapter XX-C, as compared to the provisions of Chapter XX-A.

Any law which operates as a restriction on the rights of persons has to be confined to operate strictly within the area sought to be covered by the language of the said law. If by the time Chapter XX-C came into force, there has been already a transaction resulting in the transfer as defined, the Court cannot read Chapter XX-C so as to make it retrospective to operate on the said transaction or transfer. The term transfer has to be considered in the light of the provisions operating at the time of the transfer.

If a transfer falling under Chapter XX-A has not been subjected to any acquisition proceedings under the said Chapter, the immunity accrued to such a transfer under the statute cannot be easily defeated by enlarging the scope of subsequently enacted Chapter XX-C. The wording of Chapter XX-C clearly and unambiguously does not purport to operate on the earlier transactions. Rights and liabilities created or incurred under a prior law is always considered as continuing to exist, unless the subsequent law has manifestly expressed a contrary intention. The learned counsel for the petitioners advanced broader proposition to the effect that Chapter XX-C is not made retrospective so as to operate on all pre-existing agreements. We do not think it is necessary for us to consider this proposition, in view of our understanding of the statutory term 'transfer' as defined in the two Chapters XX-A and XX-C. If the transactions reflected by the two agreements before us are transfers as defined in Chapter XX-A then, provisions of the said Chapter would have already operated on the two agreements, leaving nothing for the application of the provisions of Chapter XX-C. The main contention of the revenue is that, there were no tranfers earlier to the bringing into force of Chapter XX-C and the provisions of Chapter XX-C would govern all transfers that take place after the said Chapter came into force: on this there should not and cannot be any doubt, because section 269UC of the Act say that no transfer shall be effected except, as stated in the said provision. But, if transfer has already been effected, this provision cannot operate on it. As already found by us, the term transfer and referred here, is not a transfer as ordinarily understood and this term is not confined to the transfers referred in Transfer of Property Act. The term has a wide connotation - both under section 269UA(f) and section 269A(2)(h), read with the relevant definitions.

The broader proposition advanced by the learned counsel for the petitioners finds support from some of the observations made by a Bench of this Court in *Capt. Sanjeev Sethi vs. Union of India* (1959) ITR 338 (sic). Owner of the property entered into an agreement in the year 1979 under which the developer had to put up a multi-storeyed residential building, in which the owner was to be allotted 35 per cent of the saleable area. A series of events, involving litigations took place subsequently. An order also came

to be passed under section 269UD(1) under Chapter XX-C ordering the purchase of a flat by the Central Government; this was challenged before this Court. This Court held that, the sale of the flat leading to the impugned order under section 269UD was in effect, the giving effect to the agreements of the year 1979 and, therefore, Chapter XX-C was not applicable to the transaction. All the subsequent events happened after the year 1979 were traced to the agreement of the year 1979, though another builder had stepped into the shoes of the original builder, but the right to the allotment of the flats under the earlier agreement contained to exist. Further it was held that since Chapter XX-C was not attracted. Rule 48L also was not applicable and that the said rule had no retrospective operation and would not govern an agreement entered into prior to 1-10-1988 (the date when Chapter XX-C came into force). Specially to such cases where the provisions of Chapter XX-A were applicable like the present case.

The learned counsel for the revenue sought to distinguish this decision by pointing out that the said decision was rendered prior to the decision of the Supreme Court in *C.B. Gautam's* case (supra) and that some of the observations of the Supreme Court in *C.B. Gautam's* case (supra) by necessary implication overrule the ratio of the decision of this Court in *Capt. Sanjeev Sethi's* case (supra).

We do not think so, as will be presently seen.

The decision of this Court in *Capt. Sanjeev Sethi's* case (supra) stood affirmed by the Supreme Court when the Special Leave Petition No. 8451 of 1993 filed by the revenue was rejected on 23.8.1993. No doubt, dismissal of a special leave petition may not always operate as a binding precedent, affirming the ratio of the decision of the High Court. By that time, the Supreme Court has decided *C.B. Gautam's* case (supra) on 17.11.1992 and 27.11.1992.

The learned counsel for the revenue laid great emphasis on the facts of *C.B. Gautam's* case (supra). In the said case, owner of the property had entered into an agreement to transfer the leasehold rights on 4.2.1985 (prior to Chapter XX-C); a sum of Rs. 4.5 lakhs was paid as the advance price. There was also an agreement for the construction of a structure on the plot. On 9.7.1986, a fresh agreement to sell the residential house put up on the plot was executed between the parties. Wherein the owner agreed to transfer to Gautam his lease-hold rights along with the ownership of the construction; on 1.10.1986, Chapter XX-C was brought into force. And an order for purchases by Central Government came to be passed under the said Chapter. This was challenged on many grounds, but at the time of the arguments, the learned counsel confined the ground of attack based on the principles of natural justice. The Supreme Court held that before an order of purchase is made under Chapter XX-C, it was necessary to hear the affected persons and the principles of naturall justice are to

be read into the procedural requirements (vide *C.B. Gautam's case* (supra) at 553). There was also an argument that provisions of Chapter XX-C were invalid as they confer unfettered discretion on the authorities.

This challenge also failed (vide at page 551). However, the Supreme Court struck down the last part of sub-section (1) of section 269UB of the Act insofar as it provided that the property in respect of which an order is made under section 269UB shall vest in Central Government 'free of all encumbrances'. (vide at page 557). There are few more observations with which we are not concerned here.

The learned counsel for the revenue argued that even though the agreement in question in *C.B. Gautam's* case (supra) was prior to 1.10.1986, the Supreme Court proceeded as if Chapter XX-C applied to the transaction; according to the learned counsel, this is a clear indication that all transfers to be effected after 1.10.1986 in pursuance of an earlier agreement, are governed by Chapter XX-C.

The contention of the learned counsel for the revenue assumes that no agreement can be considered as a transfer as defined in Chapter XX-A or Chapter XX-C. The argument overlooks the definition of the terms 'transfer' and 'immovable property'. In *C.B. Gautam's* case (supra) the agreement entered into prior to 1.10.1986, was not a transfer as defined in these two Chapters; the transfer took place only after 1.10.1986. Obviously, there was no occasion for the Court to apply the definition of the terms 'transfer' and 'immovable property'.

On the very day judgment in *C.B. Gautam's* case (supra) was rendered, the court had also pronounced its decision in another case, *Rambai Manjanath Nayak vs. Union of India* (1993) 201 ITR 422 (SC). The court considered the scope of Chapter XX-A, and in so doing made the following observations:

> "The scheme of Chapter XX-A clearly shows that the acquisition is not merely of the proprietary rights in the acquired property but also of the possessory rights therein which would undoubtedly include the tenancy rights. This also finds support from section 269AB, which was inserted subsequently. It requires registration of certain transactions which permit possession of any immovable property to be taken or retained and whereby a person acquires any rights in or with respect to any building or part of it, which has been constructed or which is to be constructed, not being a transaction by way of sale, exchange or lease thereof which is required to be registered under the Registration Act. This provision, clearly indicates that any transaction conferring a right to take or retain possession of the immovable property or whereby a person acquires any rights therein is also governed by Chapter XX-A ..." (p. 431)

These observations bring out the wide scope of section 269AB. The creation of any right enabling the taking up the possession for enjoyment of a building

to be put up, under a transaction, would, therefore, attract the applicatio of Chapter XX-A. Just like any other transfer, including a transfer involve in an agreement referred in section 53A of the Transfer of Property Ac

Mr. Rajendra relied on a decision of a Division Bench of Gujarat High Cou in *Shantivan Corpn. vs. Sub-Registrar* (1981) 189 ITR 583. There Chapt XX-C was made applicable with effect from 1.6.1989. The sale deed wa executed on 29.5.1989 and it was lodged with Registrar for registratic on 30.5.1989. In spite of these facts, the Court held that transfer toc place after 1.6.1989, as there was no registration of the sale deed till th date and, therefore, Chapter XX-C governed the transaction. It is necessa to note that notification applying Chapter XX-C to the area in questic had been issued on 8.5.1989 itself. The Court proceeded on the assumptic that real 'transfer' took place only after the registration of the sale deed (whic was after 1-6-1989). The real basis for the findings are found thus:

> "It is thus clear from the above material terms of the document th the ownership in the said property was to be transferred only on th payment of the entire amount of consideration, i.e., when all the pos dated cheques including the last post-dated cheques were honoure The terms of the document clearly show that the title in the proper was not intended to be passed until the amount of consideration wa fully received by the transferor. When the said document which wa executed on May 29, 1989, provides that the transaction was to b completed only on the payment of the entire amount of consideratio and that, thereafter, only the transferee was to be treated as own of the property. It can never be said that there was transfer of ownersh amounting to sale prior to June 1, 1989. It is clear to us from th terms of the deed that the sale had not become effective before Jun 1,1989, and, therefore, even apart from the question of the docume not being registered, the terms of the deed negative the theory of an transfer of the property having been effected prior to June 1, 198 As per the terms of the deed, even the possession was not to b transferred before the last payment was received towards the consi eration amount. We, therefore, hold that no transfer of property b way of sale had taken place prior to June 1, 1989, so as to make th provisions of Chapter XX-C of the Act inapplicable to the said propert as contended by the petitioner." (p. 589)

We do not think it necessary for us to express our agreement or disagreeme with this decision. The Court, as a fact, that there was no transfer as defin in Chapter XX-A or XX-C, prior to the coming into force of Chapt XX-C. If so, necessarily the ultimate conclusion has to be that Chapt XX-C governed the transfer.

Petitioners also rely on the decision of a learned Judge of Calcutta Hi Court in *Chandravadan Desai vs. Appropriate Authority* [Writ Petitio

No. 2552 of 1988, dated 13.1.1994] and a decision of a learned Judge of Rajasthan High Court in *Keshav Singh vs. Valuation Officer* [1992] 195 ITR 435.

In view of the statutory definitions of the relevant terms in Chapters XX-A and XX-C, we have no hesitation in holding that both the agreements in these two writ petitions enable the respective vendees to enjoy the houses to be constructed under the agreements and, therefore, constituted transfers prior to the enforcement of Chapter XX-C and that these transfers (agreements) were governed by the provisions of Chapter XX-A.

Consequently, these writ petitions are allowed. The order made under Chapter XX-C for the purchase of the properties in question and consequential vesting in the Central Government are quashed.

Rule made absolute. No costs.

(1995) 126 Taxation 42 (Kar.)

IN THE HIGH COURT OF KARNATAKA

(Before Hon'ble Mr. Justice Rajendra Babu & Hon'ble Mr. Justice R.V. Vasanthakumar)

I.T.R.C. No. 57/1985

Commissioner of Income-tax-I

vs.

Bharat Earth Movers Ltd.

For the Appellant	:	**H.L. Dattu**
For the Respondent	:	**King & Partridge**
Decided on	:	7.11.1994

BUSINESS EXPENDITURE — Company introducing scheme entitling employees to encash leave — Accrued leave reserve created and each year's liability credited based on leave entitlement of every employee — Assessee claiming deduction of the liability — Held, encashment of leave salary possible on happening of certain events — Reserve nothing but contingent liability and not ascertained liability — Amount not deductible.

Income-tax Act, 1961 — Section 37(1).

FACTS

Assessee company introduced a scheme by virtue of which employees of the assessee company were entitled to enacash leave at their credit. The assessee in its books of account maintained an entry as accrued leave reserve to which it credited every year liablity in respect of leave based on leave entitlement of every employee and having made such provision to meet the liability in regard to payment of leave with wages

claimed deduction in respect of that provision. Original assessing authority disallowed the claim. On an appeal, first appellate authority upheld the contention of the assessee. The Tribunal also confirmed the order of the appellate authority.

DECISION

The Hon'ble Court held that leave salary was payable only when a person goes on leave and during the period of leave the salary paid to him are known as leave salary. It cannot be ascertained with any certainty whether in a particular year, the employee would go on leave. It will depend upon the option of the employee. Unless employee goes on leave, the assessee is not requied to pay leave salary. The liability will only arise when a person goes on leave and it is only for that particular period he is on leave the leave salary is payable. The Hon'ble court held that they were unable to accept the contention of the assessee that at the end of accounting year, it was known what is the quantum of leave due to a particular employee and on that basis a calculation could be made with accuracy. No one makes a provision for salary because salary is only payable after the employee renders the service and then only it will accrue to him. Similarly in case of salary which are paid during the leave period the employee becomes entitled to such leave salary only when he goes on leave. Accumulated leave to the extent permissible under various schemes in question can only be encashed at the time of happening of event as envisaged under the conditions of service either under the rules or scheme applicable to the employees in question. As such, this is nothing but a contingent liability and not a certain liability. The Hon'ble Court was of the view that neither the leave salary nor the leave encashment benefit payable to the employees can be said to be a present liablity, but it is only a contingent liability and assessee is not entitled to deductions. Hence the question was answered in favour of the revenue.

Cases referred to :

1. *CIT vs. Premalaxman* (1984) 150 ITR 170 (Ker)
2. *CIT vs. Tharian & Sons* (1987) 166 ITR 607 (Ker.)
3. *Metal Box Co. of India Ltd. vs. Their Workmen* (1969) 73 ITR 53 (SC)
4. *CIT vs. Hindustan Aeronautics* (1988) Taxation 91(3) 323 (Kar.); (1988) 174 ITR 340 (Kar.)

Full text of the Judgment is given below :

JUDGMENT

At the instance of the Revenue, the following question of law has been referred to this Court under Section 256(1) of the Income-tax Act, 1961 :-

"Whetheron the facts and in the circumstances of the case the provision for making the liability for encashment of earned leave by the employee is an admissible deduction" ?

Assessee company introduced a scheme by virtue of which employees of the assessee company were entitled to encash leave at their credit. The assessee in its books of account maintained an entry as accrued leave reserve to which it credited every year liability in respect of leave based on leave entitlement of every employee and having made such provision to meet the liability in regard to payment of leave with wages claimed deduction in respect of that provision. Original assessing authority disallowed the claim. On an appeal, first appellate authority placing reliance on an order passed in ITA 3222340(1) Bang/80 pertaining to *Motor Industries Co. Ltd. vs. I.T.* upheld the contention of the assessee. Aggrieved by the order of the first appellate authority, Revenue brought the matter before the Income-tax Appellate Tribunal which also confirmed the order of the first appellate authority. Later on Revenue under Section 256(1) of the Act sought reference to this Court.

The main contention advanced by the assessee is that it is entitled for deduction of the amount of Rs. 6225483/- in respect of provision for accrued leave on the ground that the amount standing to the credit of the Reserve account as at the end of the accounting year 31.3.1978 represented an ascertained liability only to be discharged in the foreseeable future depending on the actual utilisation of the employee, such utilisation being a certainty. It is contended that the employee is entitled under the rules to encash the leave and he can accumulate for a certain period and as such encashed leave is earned by employee and it gets credited to his account. It is also contended that though payment is deferred, the liability of the assessee to pay for accumulated leave stands accrued. The said liability is a liability in present and not a contingent liability. It is further contended by the assessee that leave salary payable to employee can be ascertained at the end of accounting year depending on the accumulated leave to the credit of an employee and that the same is not a contingent liability but liability in *praesenti* since out of the provision made, leave salary would be paid to the employees and that the leave encashment benefit is ascertainable.

As against the above contention, the Revenue contends that provision for leave salary is not an allowable deduction and the said liability is contingent liability and not a liability in *praesenti*. It is contended that question of leave salary arises when a person goes on leave and for the particular period leave salary is payable. Person is entitled to avail of leave encashment benefit under scheme and the same is optional. This will depend on whether he actually avails himself of the leave or not. If leave is due to a person he has the option either to accumulate the leave or he may avail of the leave. If he avails of the leave, he would be entitled to the leave salary. If he does

not, he will be entitled to the benefit of encashment of the leave; these events are uncertain events and are contingent.

Test is whether a provision provides for a known liability of which amount can be determined with substantial accuracy. Decisive factor is not the methodology of accountancy or the practice followed by the Company and the intentions of the employee in getting the benefit of encashment of the leave but principle is whether such a liability is contingent or liability *in Preasenti* when once element of option is there; encashment of leave may or may not arise, liability would only be contingent and uncertain which may or may not have to be discharged. The Counsel for the assessee relies on the ratios of the decisions reported in:

CIT vs. Premalaxman (1984) 150 ITR 170 (Ker).

CIT vs. Tharian & Sons (1987) 166 ITR 607 (Ker).

Metal Box Co. of India Ltd. vs. Their Workmen (1969) 73 ITR 53 (SC)

In *Metal Box Company's* case the Supreme Court laid down certain guiding principles in respect of liabilities arising under a scheme of gratuity which is to be stated as not of much assistance to the contentions advanced by the assessee. Supreme Court in that case was concerned, *inter alia*, with the question whether it is legitimate in a scheme of gratuity to estimate the liability on actuarial valuation and deduct such estimated liability in the profit and loss account while working out net profit. Supreme Court held that if liability is properly ascertainable and if it is possible to arrive at its discounted present value even if the liability is contingent liability it can be taken into account. That question does not arise here.

Counsel for the Revenue invites attention of the Court to the râtio decided in *CIT vs. Hindustan Aeronautics* reported in (1988) 174 ITR 340 Karnataka wherein one of us namely Rajendra Babu, J., was a member, who delivered the judgment wherein it is observed that the provision for accrued leave salary as being a contingent liability and the same as not being a permissible deduction.

Leave salary was payable only when a person goes on leave and during the period of leave the salary paid to him are known as leave salary. It cannot be ascertained with any certainty whether in a particular year, the employee would go on leave. It will depend upon the option of the employee. Unless employee goes on leave, the assessee is not required to pay leave salary. The liability will only arise when a person goes on leave and it is only for that particular period he is on leave the leave salary is payable. We were unable to accept the contention of the assessee that at the end of accounting year, it is known what is the quantum of leave due to a particular employee and on that basis a calculation could be made with accuracy. No one makes a provision for salary because salary is only payable after the employee renders the service and then only it will accrue to him.

Similarly in case of salary which are paid during the leave period the employee becomes entitled to such leave salary only when he goes on leave. Accumulated leave to the extent permissible under various schemes in question can only be encashed at the time of happening of event as envisaged under the conditions of service either under the rules or scheme applicable to the employees in question. As such, this is nothing but a contingent liability and not a certain liability. We respectfully disagree with the ratio laid down in *Prema Laxman's* case which decided the same while dealing with provisions of wealth-tax Act. We are of the view that neither the leave salary nor the leave encashment benefit payable to the employees can be said to be a present liability, but it is only a contingent liability and assessee is not entitled to deductions. Hence the question was answered in favour of the revenue.

(1995) 126 Taxation 46 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Justice Y.R. Meena & Hon'ble Mr. Justice V.K. Singhal)

D.B.I.T. Reference No. 9 of 1984

Commissioner of Income-tax

vs.

M/s Pink Jewellers

For the Appellant	:	**G.S. Bapna**
For the Respondent	:	**T.C. Jain**
Decided on	:	10.2.1995

DEDUCTIONS — Assessee engaged in processing and sale of precious stones — Deduction claimed u/s 35-B(1)(a) on the ground of small scale exporter — Claim not allowed by the revenue — Allowed by the Tribunal — Held, no document to show assessee himself manufacturing or processing precious stones — Precious stones got processed/manufactured through labour on the basis of work — Assessee not entitled to weighted deduction.

Income-tax Act, 1961 — Section 35-B(1)(a).

FACTS

The assessee is engaged in the business of processing and sale of precious stones. It claimed weighted deduction u/s 35-B(1)(a) of Rs. 12,366/- on the ground that he is a small scale exporter. Claim was not allowed by the ITO on the ground that processing of stones cannot be considered as an industry at all. On appeal, the claim was allowed by the Tribunal.

DECISION

The Hon'ble court held that it was for the assessee to prove when a deduction is claimed that the goods produced or manufactured are in a small scale

undertaking. The assessee was getting goods manufactured through labourers paid on the basis of work done. There was no information on the basis of which it could be said that the goods which were manufactured or produced were goods which were from small scale undertaking owned by the assessee. The assessee was thus not entitled to weighted deduction as claimed. Reference was decided in favour of the revenue.

Case referred to :

CIT vs. Dhandia Gems Corporation (1994) 123 Taxation 269 (Raj.); (1994) 208 ITR 923

Full text of the Judgment is given below ;

JUDGMENT

(Y.R. Meena, J.)

The Income-tax Appellate Tribunal has referred the following question of law arising out of its order dt. 30.6.1983 in respect of the assessment year 1979-80 under sec. 256(1) of the Income-tax Act, 1961 :-

> "Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the assessee firm is an industrial undertaking and consequently in directing to allow deduction u/s 35B(1)(a) of the I.T. Act, 1961?"

The brief facts of the case are that the assessee firm is engaged in the business of processing and sale of precious stones. It claimed weighted deduction u/s 35-B(1)(a) of Rs. 12,366/- on the ground that he is a small scale exporter. Claim was not allowed by the ITO on the ground that processing of stones cannot be considered as an industry at all, therefore the grant of weighted deduction is not allowable. The CIT Appeals in an appeal preferred by the assessee came to the conclusion that the definition of small scale exporter has been given in the Section, which means that a person who export goods manufactured or produced in any small scale industrial undertaking or undertaking owned by him and came to the conclusion that assessee is an industrial undertaking. The order of CIT Appeals was challenged by the Revenue before the Tribunal and the Tribunal observed that the same issue came up for consideration before the Tribunal in the case of *M/s. Dhandia Gems Corporation* and on the basis of the said decision the appeal of Revenue was dismissed.

The submission of Mr. Bapna, counsel for the Revenue is that the decision of *M/s. Dhandia Gems Corporation* which has been relied upon by the Tribunal is different and therefore, the view which has been taken by the Tribunal should be considered in accordance with law. Shri T.C. Jain for the assessee submitted that finding of facts has not been recorded and the ingredients which were necessary for the purpose of establishing the fact

it is to be presumed that the case of assessee is similar to the case of *Dhandia Gems Corporation* as he himself placed reliance on the said decision before the Tribunal. The decision of the Tribunal in *Dhandia Gems Corporation* has already been considered by this Court in the case of *CIT vs. Dhandia Gems Corpn.* 208 ITR 923. In the said decision it was found that manufacture was done through labourers paid on the basis of work done. There was no document on the basis of which it could be said that the goods which were manufactured or produced were goods which were from a small scale industrial undertaking owned by the assessee. The assessee was not entitled to weighted deduction u/s 35B(1)(a) of the Income-tax Act, 1961.

Accordingly the reference is answered in favour of the revenue and against the assessee. No order as to cost.

(1995) 126 Taxation 48 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

(Before Hon'ble Mr. Justice M.N. Rao and Hon'ble Mr. Justice T.N.C. Rangarajan)

Referred Case No. 19 of 1986

Commissioner of Income-tax

vs.

Supreme Construction Co.

For the Appellant	:	**S.R. Ashok**
For the Respondent	:	**T. Bheemsen**
Decided on	:	1.3.1994

REOPENING OF ASSESSMENT — Assessment reopened — Assessment completed after reference to IAC u/s 144B — Assessee contending Section 144B not applicable to reassessment hence assessment barred by limitation — Held, assessment framed by ITO after reopening also an assessment u/s 143(3) — ITO has powers to refer the matter to IAC as envisaged by section 144B — Assessment not barred by limitation.

Income-tax Act, 1961 — Sections 144B, 147 & 153.

FACTS

The assessee is a firm of contractors. The original assessment for the A.Y. 1973-74 was completed on 22.12.1973 on a returned income of Rs. 5,37,780/- and the assessment for the year 1974-75 was completed on 5.11.1975 on a returned income of Rs. 3,28,795/-. The assessments were reopened u/s 147 of the Act. The ITO made a draft assessment and referred the matter to the IAC u/s 144B of the Act who gave the direction on 2.8.1979. The assessment was completed on 10.8.1979

following the directions issued by the IAC. The case of the assessee was that section 144B should not have been invoked for a re-assessment u/s 147 and, therefore, the assessment order dated 10.8.1979 was barred by time. The Tribunal accepted the contention of the assessee.

DECISION

A reading of Section 144B, at first sight, may give the impression that assessment or reassessment proceedings u/s 147 are outside its purview since it mentions only section 143(3). Such a construction ignores the specific language employed in section 148 under which the assessing authority gets power to issue notice for reopening the assessments u/s 147. The phrase 'so far as may be' implies that if there is anything inconsistent in the statutory provisions that come into play pursuant to a notice u/s 139 (2), to the extent of that inconsistency resort cannot be made to any other section of the Act. By necessary implication, the Hon'ble court concluded that section 144B not being inconsistent with section 148, that procedure has to be followed in an assessment or reassessment u/s 147. The Hon'ble Court, therefore, concluded that, without reference to section 143(3), reassessment could not be made u/s 147 and, by virtue of the specific language employed in section 148, there is no embargo on the assessing authority to invoke the provisions of section 144B.

Cases referred to :

1. *CIT vs. Usha Aggarwal* (1989) 178 ITR 406 (P&H)
2. *CIT vs. Simson & McConechy Ltd.* (1989) Taxation 93(3) 179 (Mad.); (1989) 177 ITR 526 (Mad.)
3. *Dr. Partap Singh vs. Director of Enforcement* (1985) Taxation 78(3) 243 (SC); AIR (1985) SC 989.
4. *Kerala Kaumudi (P) Ltd. vs. CIT* (1990) Taxation 97(3) 2[illegible] (Ker.); (1990) 181 ITR 30 (Ker.)

Full text of the Judgment is given below :

JUDGMENT

(M.N. Rao, J.)

The question referred for our decision under section 256(1) of the Income-tax Act, 1961 ('the Act') is:

> "Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in cancelling the assessments for the assessment years 1973-74 and 1974-75 as invalid and without jurisdiction?"

The assessee is a firm of contractors. The original assessment for the A.Y. 1973-74 was completed on 22.12.1973 on a returned income of Rs. 5,37,780/- and the assessment for the year 1974-75 was completed

on 5.11.1975 on a returned income of Rs. 3,28,795/-. The assessments were reopened u/s 147 of the Act on the basis of information received from the Judicial Commissioner of Inquiry headed by Shri Jusher Alladi Kuppuswamy as regards certain tenders accepted by the assessee-company. Notice under section 148 was served on the assessee on 26.3.1978 and the last date for finalising the assessment was 26.3.1979 under section 153(2)(b) of the Act. However, the ITO made a draft assessment u/s 144B of the Act and referred the matter to the IAC who gave the direction on 2.8.1979. The assessment was completed on 10.8.1979 following the directions issued by the IAC. The case of the assessee was that section 144B should not have been invoked for a re-assessment u/s 147 and, therefore, the assessment order dated 10.8.1979 was barred by time.

The Tribunal accepted the contention of the assessee and, at the instance of the revenue, referred the question stated above for our decision.

As the question framed does not bring out precisely the matter at issue, we reframe the question in the following terms:

"Whether section 144B has no application in respect of assessments and reassessments made under section 147 ?"

It is the contention of Shri S.R. Ashok, the learned counsel for revenue, that the entire gamut of statutory provisions that come into play in consequence of issue of a notice under sub-section (2) of section 139 are attracted to notice under section 148 of the Act. Whenever a notice was issued under section 139(2), there was no bar for the assessing authority to invoke section 144B since that would be attracted by virtue of section 143(3) of the Act. Controverting this, Shri Bheemsen, the learned counsel for the assessee, says that inasmuch as section 147 is independent of section 143, the classes of assessment that fall within the ambit of section 144B are excluded from the purview of section 148.

In order to appreciate the rival contentions advanced before us it is useful to notice the relevant provisions as obtaining then. Section 148, which confers power to issue notice where income has escaped assessment, is in the following terms :

"*Issue of notice where income has escaped assessment* - (1) Before making the assessment, reassessment or recomputation under section 147, the Income-tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) The Income-tax Officer shall, before issuing any notice under this section record his reasons for doing so."

Sub-section (2) of Section 139 reads as under:

"(2) In the case of any person who, in the Income-tax Officer's opinion, is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income-tax Office may, before the end of the relevant assessment year, issue a notice to him and serve the same upon his requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed :

Provided that, on an application made in the prescribed manner, the Income-tax Office may, in his discretion, extend the date for furnishing the return, and notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of sub-section (8)."

Sub-sections (5), (6), (6A), (7) and (8) refer to sub-section (2) providing for corrections of errors on filing revised returns. Then comes section 142 of the Act which speaks of enquiry before assessment. The power to make assessment is incorporated in section 143(3):

"(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Income-tax Officer may require on specified points, and after taking into account all relevant material which he has gathered, -

(a) in a case where no assessment has been made under sub-section (1), the Income-tax Officer shall, by an order in writing make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment;"

If an assessee fails to make a return pursuant to receipt of notice under sub-section (2) of section 139, the assessing authority is empowered to make a best judgment assessment under section 144. This is the normal procedure for making an assessment. We may also mention that the expression 'assessment' as defined by clause (8) of section 2 of the Act reads as follows:

"(8) 'assessment' includes reassessment;"

The Government of India had appointed a High Power Committee headed by Justice Wanchoo, former Chief Justice of India, to study the then existing tax pattern and recommend amendments. One of the recommendations made by the Committee relates to ensuring safeguards to assessees by giving opportunity in the form of reassessment notice. The relevant recommendation is as follows :

"As regards disputed additions in assessments, a point has been made before us that often decisions are taken by the Income-tax Officer behind

the assessee's back and the assessee comes to know of additions and disallowance only after the assessment has been made and an order is received by him. In many cases, the dispute could have been avoided if adequate opportunity has been given to the taxpayer to explain the position. We are aware that such situations do frequently arise. To ensure that the assessee gets a reasonable opportunity of meeting the objections of the Income-tax Officer, before an assessment is finalised, we recommend that there should be a provision in the law requiring the Income-tax Officer to send a draft assessment order to the assessee, to start with, in all cases where the additions or disallowances proposed to be made in assessment order under sub-section (3) of section 143 exceed in the aggregate Rs. 25,000. Where the taxpayer objects to the assessment being made on the basis of the draft order, he should intimate his objections within seven days to the Inspecting Assistant Commissioner who will, after hearing the assessee and the Income-tax Officer, pass the final order of assessment himself. For this purpose, the Inspecting Assistant Commissioner should have the power to accept, reduce or enhance the income proposed in the draft order. Such a measure will also ensure that major disputes with the taxpayers are settled or dealt with at a level higher than that of the Income-tax Officer."

In consequence of the above recommendation, section 144B was enacted. It is in the following terms:

"*Reference to Inspecting Assistant Commissioner in certain cases.* - (1) Notwithstanding anything contained in this Act, where, in a assessment to be made under sub-section (3) of section 143, the Income-tax Officer proposes to make any variation in the income or loss returned which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board under sub-section (6), the Income-tax Officer shall, in the first instance, forward a draft of the proposed order of assessment (thereafter in this section referred to as the draft order) to the assessee.

(2) On receipt of the draft order, the assessee may forward his objections, if any, to such variation, to the Income-tax Officer within seven days of the receipt by him of the draft order or within such further period not exceeding fifteen days as the Income-tax Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period of the extended period aforesaid, or the assessee intimates to the Income-tax Officer the acceptance of the variation, the Income-tax Officer shall complete the assessment on the basis of the draft order.

(4) If any objections are received, the Income-tax Officer shall forward the draft order together with the objections to the Inspecting Assistant Commissioner and the Inspecting Assistance Commissioner shall, after

considering the draft order and the objections and after going through (wherever necessary) the records relating to the draft order, issue, in respect of the matter covered by the objections, such directions as he thinks fit for the guidance of the Income-tax Officer to enable him to complete the assessment :

Provided that no directions which are prejudicial to the assessee shall be issued under this sub-section before an opportunity is given to the assessee to be heard.

(5) Every direction issued by the Inspecting Assistant Commissioner under sub-section (4) shall be binding on the Income-tax Officer.

(6) For the purposes of sub-section (1), the Board may, having regard to the proper and efficient management of the work of assessment, by order, fix from time to time, such amount as it deems fit:

Provided that different amounts may be fixed for different years :

Provided further that the amount fixed under this sub-section shall, in no case, be less than twenty-five thousand rupees.

(7) Nothing in this section shall apply to a case where an Inspecting Assistant Commissioner exercises the powers or performs the functions of an Income-tax Officer in pursuance of an order made under section 125 or section 125A."

Section 153 provides for time-limit for completion of assessments and reassessments. Clause (iv) of *Explanation* 1 lays down that within 180 days proceedings under section 144B shall be completed in cases where the assessee had submitted objections. In other cases, the time-limit prescribed thirty days.

From a reading of the relevant statutory provisions extracted supra, it appears to be fairly clear that whenever a notice was issued under section 148 by the Assessing Officer, the provisions of the Act so far as may be, would come into play as if the notice issued was a notice under sub-section (2) of section 139. What needs to be considered in this context is whether section 144B is one of statutory provisions that are attracted in case where notice was issued under section 139(2)? Whenever a notice is issued under section 139(2), an enquiry is held under section 142 and an assessment is made under section 143. In assessment made under section 143, it is specifically laid down by section 144B that the draft assessment procedure should be followed. It would, thus, appear that the procedure laid down by section 144B is part of the procedure contemplated under section 143(3).

A reading of Section 144B, at first sight, may give the impression that assessment or reassessment proceedings u/s 147 are outside its purview since it mentions only section 143(3). Such a construction ignores the specific language employed in section 148 under which the assessing authority gets power to issue notice for reopening the assessments u/s 147.

As already noticed, section 148 lays down that the provisions of the Act shall, so far as may be, apply to a reassessment made under section 147. The phrase 'so far as may be' implies that if there is anything inconsistent in the statutory provisions that come into play pursuant to a notice u/s 139 (2), to the extent of that inconsistency resort cannot be made to any other section of the Act. By necessary implication, the Hon'ble court concluded that section 144B not being inconsistent with section 148, that procedure has to be followed in an assessment or reassessment u/s 147. In *Dr. Partap Singh vs. Director of Enforcement* AIR 1985 SC 989 the expression 'so far as may be' came up for consideration. Section 37(1) of the Foreign Exchange Regulation Act, 1947, obligates the officer issuing a search warrant, to record in writing, the grounds of his belief. Sub-section (2) provides that the provisions of the Code of Criminal Procedure, 1908, relating to searches shall, so far as may be, apply to searches under that section, subject to certain modifications. The Supreme Court observed:

> "...The expression 'so far as may be' has always been construed to mean that those provisions may be generally followed to the extent possible...." (p. 993)

In *CIT vs. Usha Aggarwal* (1989) 178 ITR 406 the question for consideration before the Punjab and Haryana High Court was : Whether in respect of assessment made under section 147, the provisions of section 144B were applicable? The Punjab and Haryana High Court, on a literal interpretation of section 144B, in isolation and without referring to section 148, has held that it would not apply to section 147 proceedings because section 147 is not mentioned in section 144B. With great respect, we are unable to follow that view. The Madras High Court view, as contained in *CIT vs. Simson & Mc Conechy Ltd.* (1989) 177 ITR 526 is, based upon the language of section 153 which provides for separate limitations for assessments and reassessments. The Madras High Court has assumed that exclusion of the time taken for section 144B proceedings as incorporated in clause (iv) of *Explanation* 1 to section 153 will not apply to reassessment proceedings under section 153(2). But the opening words of *Explanation* 1 of section 153, "In computing the period of limitation for purposes of this section..." refer to assessments and reassessments under sub-sections (1) and (2) of section 153. Moreover, under section 147, assessment can be made, for the first time also, in cases where no return was filed and no assessment had been made earlier and informations had reached the assessing authority that income assessable to tax had escaped assessment. We, therefore, with great respect, are unable to agree with the Madras High Court view. A contrary view was taken by the Kerala High Court in *Kerala Kaumudi (P.) Ltd. vs. CIT* (1990) 181 ITR 30. After referring to the relevant case law on this question, the Kerala High Court observed :

> "A survey of the above decisions establishes that there can be only one assessment for each year, that once proceedings under section 147 of

> the Act are initiated by issuing a notice under section 148, read with section 139(2) of the Act, the assessment proceedings start afresh, and that the proceedings for assessment of that year will be pending and will continue until a final order of assessment is rendered ..." (p. 37)

We respectfully agree with the Kerala High Court view. We, therefore, conclude that, without reference to section 143(3), reassessment cannot be made under section 147 and, by virtue of the specific language employed in section 148, there is no embargo on the assessing authority to invoke the provisions of section 144B introduced for the protection of the assessee by providing for a pre-assessment notice. We, therefore, hold that the assessment in question was within time. The view taken by the Tribunal is unsustainable in law. The question referred for our decision is answered in the negative, i.e., in favour of the revenue and against the assessee. No costs.

(1995) 126 Taxation 55 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta & Hon'ble Mr. Justice Nure Alam Chowdhury)

IT Reference No. 46 of 1992

Eastern Coils (P) Ltd.

vs.

Commissioner of Income-tax

For the Appellant	:	**A.K. Roy Chowdhury and Sandip Kumar Roy**
For the Respondent	:	**None**
Decided on	:	20.12.1993

PENALTY — Assessee failing to pay advance tax nor filing any estimate — Assessee given show cause notice — Assessee claiming advance tax not paid and estimate not filed since proper advice not received from his tax consultant — No explanation rendered and no supporting details filed before ITO or before CIT(A) — Held, not a reasonable cause — Penalty rightly levied.

Income-tax Act, 1961 — Sections 209 & 273.

FACTS

This reference relates to the income tax assessment of the assessee company for the A.Y. 1984-85. For the A.Y. 1984-85, the assessee company did neither file any estimate of its current income nor did it pay the advance tax payable by it on the current income as required by clause (b) of sub-section (1) of section 209A of the Act. In response to the show cause notice, the assessee company did not furnish any

explanation for its failure as aforesaid. The ITO accordingly, levied a penalty of Rs. 32,240/- u/s 273(2)(b) of the Act. It was submitted before the CIT(A) that the assessee was not properly advised by the previous tax consultant. The Tribunal reversed the order of the CIT(A) and restored the penalty order passed by the ITO.

DECISION

The Hon'ble court held that it is a case of a corporate assessee. This is not the first year of business. The company did not pay any advance tax notwithstanding the clear provisions of section 209A(1)(b). No explanation whatsoever was furnished before the ITO. No affidavit and/or any other evidence was filed to show that the previous Tax Consultant did not advise the assessee as to its obligation to file estimate of advance tax and pay advance tax notwithstanding that it had substantial income of over Rs. 20 lakhs. Section 273(2)(b) requires the Assessing Officer to levy penalty unless the failure to furnish the estimate was on account of any reasonable cause. Nothing has been shown as to what was the reasonable cause for the assessee's failure to file the estimate as required by clause (b) of sub-section (1) of section 209A. The Hon'ble court, accordingly, was of the view that the Tribunal was fully justified in confirming the levy of penalty u/s 273(2)(b).

Case referred to :

CWT vs. Ramniklal D. Mehta (1982) Taxation 67(3) 187 (Ori.); (1982) 136 ITR 729 (Ori.)

Full text of the Judgment is given below :

JUDGMENT

(Ajit K. Sengupta, J.)

In this reference made at the instance of the assessee, the following questions have been referred by the Tribunal for the opinion of this Court under section 256(2) of the Income-tax Act, 1961 ('the Act'):

"1. Whether, on the facts and in the circumstances of the case, the penalty proceeding initiated under section 273 of the Income-tax Act, 1961 on the basis of the original assessment was valid in law ?

2. Whether, on the facts and in the circumstances of the case, there was any material before the Tribunal justifying the reversing of the order of the Commissioner of Income-tax (Appeals) and/or the said conclusion is unreasonable and perverse ?"

The facts as found by the Tribunal are as under :

This reference relates to the income tax assessment of the assessee company for the A.Y. 1984-85. For the A.Y. 1984-85, the assessee company did neither file any estimate of its current income nor did it pay the advance tax payable by it on the current income as required by clause (b) of

sub-section (1) of section 209A of the Act. In response to the show cause notice, the assessee company did not furnish any explanation for its failure as aforesaid. In spite of another opportunity being granted by the ITO the assessee-company gave no explanation for its failure to file an estimate of its current income and pay the advance tax payable by it on the current income calculated in the manner laid down in section 209A. The ITO, accordingly, levied a penalty of Rs. 32,240 under section 273(2)(b) of the Act. The assessee, being dissatisfied, carried the matter in appeal before the Commissioner (Appeals). It was submitted before the CIT(A) that the assessee was not properly advised by the previous tax consultant. After a new tax adviser was appointed, the assessee filed a revised return for the year under reference declaring an income of Rs. 20,70,130 in March 1987 and paid tax of Rs. 10,30,951. The Commissioner (Appeals) cancelled the said penalty following the decision of the Orissa High Court in *CWT vs. Ramnikalal D. Mehta* (1982) 136 ITR 729.

On appeal by the revenue, the Tribunal found that the decision of the Orissa High court referred to by the Commissioner (Appeals) was clearly distinguishable. The failure on the part of the previous tax consultant to advise the assessee properly could not be accepted as a reasonable cause for non-filing of estimate particularly when no explanation whatsoever was rendered by the assessee before the ITO and no supporting details and/or evidence were produced by it before the Commissioner (Appeals) in support of its submission that it was not properly advised by the previous tax consultant. The Tribunal, therefore, reversed the order of the CIT(A) and restored the penalty order passed by the ITO.

In *Ramniklal D. Mehta's* case (supra), the WTO levied penalty for failure to file the wealth-tax returns. The Tribunal found that the assessee was regularly filing its income-tax returns and there was no reason as to why the assessee should have avoided filing of wealth-tax returns. Had he, in fact, been advised to do so, he could not have hoped to conceal the particulars of wealth from the department because they were already on the departmental records. The Tribunal noted that it was not concerned with the question as to how and why the adviser of the assessee failed to advise the assessee regarding the filing of the returns voluntarily. The Tribunal observed that the assessee did not, in fact, get any such advice from his tax adviser to file the wealth-tax returns and this explanation given by the assessee was regarded as satisfactory by the Tribunal. This decision of the Tribunal was upheld by the Orissa High Court on reference by the revenue.

The facts of the present case before us are quite peculiar. The assessee admittly filed revised return showing income of Rs. 20,79,130. It is a case of a corporate assessee. This is not the first year of business. The company did not pay advance tax notwithstanding the clear provisions of section 209A(1)(b). No explanation whatsoever was furnished before the ITO in

response to the show-cause notice as to why penalty should not be levied in this case for failure to file the estimate of current income and to pay advance tax. Even when another opportunity was given by the ITO, the assessee did not come forward to offer any explanation. Before the Commissioner (Appeals), the assessee for the first time orally claimed that the previous tax consultant did not advise the assessee properly. The name of the previous tax consultant was not disclosed. No affidavit and/or any other evidence was filed to show that the previous Tax Consultant did not advise the assessee as to its obligation to file estimate of advance tax and pay advance tax notwithstanding that it had substantial income of over Rs. 20 lakhs. The oral explanation given by the assessee to the ITO was believed by the Commissioner (Appeals) The decision of the Orissa High Court is, therefore, clearly distinguishable. Nothing has been shown to us as to how the decision of the Tribunal is unreasonable and/or perverse. Every assessee is under a statutory obligation to estimate its current income and pay advance tax in accordance with the provisions of section 209A(1)(b). If the statutory obligation to this effect is not complied with, Section 273(2)(b) requires the Assessing Officer to levy penalty unless the failure to furnish the estimate was on account of any reasonable cause. Nothing has been shown as to what was the reasonable cause for the assessee's failure to file the estimate as required by clause (b) of sub-section (1) of section 209A.

In this view of the matter, we find that there is no merit in the assessee's reference. We are, accordingly, of the view that the Tribunal was fully justified in confirming the levy of penalty under section 273(2)(b).

The first question is, therefore, answered in the affirmative and in favour of the revenue.

The second question is answered by saying that the Tribunal was fully justified in reversing the order of the Commissioner (Appeals) and its conclusion is neither unreasonable nor perverse.

There will be no order as to costs.

Nure Alam Chowdhury, J - I agree.

(1995) 126 Taxation 59 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta & Hon'ble Mr. Justice Nure Alam Chowdhury)

IT Reference No. 71 of 1992

Commissioner of Income-tax

vs.

Raval Papers Ltd.

For the Appellant	:	**S.K. Mitra and S.K. Mukherjee**
For the Respondent	:	**None**
Decided on	:	23.11.1993

DEPRECIATION — Determination of actual cost — Assessee receiving capital subsidy under Central Investment Subsidy Scheme for setting up unit in backward area — Revenue subtracting the same from the cost of assets — Tribunal holding subsidy neither taxable nor to be reduced from the cost of assets — Held, subsidy not granted for any specific asset — Subsidy mainly an incentive to set up industry in backward areas — Subsidy amount not to be reduced from cost of assets for purposes of depreciation.

Income-tax Act, 1961 — Section 43(1).

FACTS

The facts relating to this reference are that the assessee in the above period received capital subsidy under the Central Investment Subsidy Scheme, 1971 for setting up an industrial unit at Rai Bareli, a backward area in U.P. The Assessing Officer, while working out the permissible depreciation, deducted the amount of subsidy received from the cost of assets u/s 43(1) of the said Act and allowed depreciation on the reduced amount. On appeal, the CIT(A) directed the Assessing Officer not to take into account the capital subsidy received by the assessee while working out 'Actual cost of assets' u/s 43(1) of the Act. The decision of the CIT(A) was confirmed by the Tribunal.

DECISION

It is not in dispute that this question is now concluded by a decision of this court in the case of *CIT vs. Dewas Synthetics (P) Ltd.* (1991) 188 ITR 16. Following the said decision, the Hon'ble court answered the question in the affirmative and in favour of the assessee. Mr. Mitra appearing for the revenue has prayed for oral leave u/s 261 of the Act. He submitted that this matter is pending before the Supreme Court as the Supreme Court granted special leave to the department in many of the cases. Having regard to the fact that this question is now before the Supreme Court, the Hon'ble court certified that this was a fit case for appeal to the Supreme Court u/s 261 of the Act.

Cases referred to :

1. *CIT vs. Godavari Plywoods Ltd.* (1987) 168 ITR 632 (AP)
2. *CIT vs. Bhandari Capacitors (P) Ltd.* (1987) Taxation 86(3) 226(M.P.); (1987) 168 ITR 647 (M.P.)
3. *CIT vs. Jindal Bros. Rice Mills* (1989) 179 ITR 470 (P&H)
4. *Makkar Bari Tea Co.* (IT Appeal No. 956 (Cal.) of 1988 dated 3.11.1989)
5. *CIT vs. Dewas Synthetics (P) Ltd.* (1991) 101 Taxation 188 (Cal.); (1991) 188 ITR 16 (Cal.)

Full text of the Judgment is given below :

JUDGMENT

(Ajit K. Sengupta, J.)

In this reference under section 256(2) of the Income-tax Act, 1961 for the assessment year 1984-85 the following question has been referred to this Court :

> "Whether, on the facts and in the circumstances of the case, and also on a proper interpretation of the provision of section 43(1) of the Income-tax Act, 1961, the Tribunal was correct in law in holding that Central subsidy received by the assessee would not be deductible to arrive at the actual cost of the depreciable assets ?"

Shortly stated, the facts relating to this reference are that the assessee in the above period received capital subsidy under the Central Investment Subsidy Scheme, 1971 for setting up an industrial unit at Rai Bareli, a backward area in U.P. The Assessing Officer, while working out the permissible depreciation, deducted the amount of subsidy received from the cost of assets u/s 43(1) of the said Act and allowed depreciation on the reduced amount.

On appeal, the CIT(A), following the decision of Andhra Pradesh High Court in the case of *CIT vs. Godavari Plywood Ltd.* (1987) 168 ITR 632 and that of the Madhya Pradesh High Court in the case of *CIT vs. Bhandari Capacitors (P.) Ltd.* (1987) 168 ITR 647, directed the Assessing Officer not to take into account the capital subsidy received by the assessee while working out 'Actual cost of assets' u/s 43(1) of the Act. The revenue being aggrieved brought the issue in appeal before the Appellate Tribunal.

Before the Tribunal, the learned departmental representative submitted that subsidy granted by the Central Government was to reduce the cost of capital depreciable assets and, therefore, was to be taken into account. Reliance was placed on the decision of the Punjab and Haryana High Court in the case of *CIT vs. Jindal Bros. Rice Mills* (1989) 179 ITR 470. He relied upon the decision of the Tribunal, Calcutta Bench C [IT Appeal No. 956

(Cal.) of 1988, dated 3.11.1989] in the case of *Makkar Bari Tea Co.* The learned counsel for the assessee supported the order of the Commissioner (Appeals).

The Tribunal after considering the rival submissions, of the parties, upheld the order of the Commissioner (Appeals) with the following observations:

> "We have carefully considered the rival submissions facts and circumstances of the case and material on record. We have also seen the Central Scheme under which the subsidy was granted to the business for setting up industry in backward area. As is evident from scheme subsidy was not granted on any specific asset but was allowed on costs of land, building, machinery, plant, etc. The matter in view of decisions of Andhra Pradesh and Madhya Pradesh High Courts is fully covered in favour of the assessee. The decision in the case of *Makkar Bari Tea Co.* related to State Transport subsidy. In that case, subsidy was held to be a revenue receipt. Likewise, the case of *Jindal Brothers Rice Mills* (supra) relates to subsidy granted by the State Government. The subsidy schemes of State Governments are quite different from Central Subsidy Scheme with which we are concerned. The decisions cited on behalf of the revenue, therefore, are not applicable to facts of the present case. These are distinguishable at any rate, even if two views of the matter are possible, we are inclined to take one in favour of the assessee. In other cases relating to Central Subsidy Scheme, ITAT Benches at Calcutta have been consistently holding that the subsidy is not to be deducted while working out actual cost of depreciable assets. In line with the above view, we uphold the order of the Commissioner of Income-tax Appeals."

It is not in dispute that this question is now concluded by the decision of this court in the case of *CIT vs. Dewas Synthetics (P) Ltd.* (1991) 188 ITR 16. Following the said decision, the Hon'ble court answered the question in the affirmative and in favour of the assessee.

Mr. Mitra appearing for the revenue has prayed for oral leave u/s 261 of the Act. He submitted that this matter is pending before the Supreme Court as the Supreme Court granted special leave to the department in many of the cases. Our attention has been drawn to 197 ITR which contains the following information :

> "Government subsidy received : Effect on actual cost or cost of investments :
>
> 20.7.1992 : Their Lordships M.N. Venkatachaliah and Dr. A.S. Anand, JJ. granted special leave to the Department to appeal against the judgment dated 2.12.1991 of the Orissa High Court in S.C. No. 171 of 1990, whereby the High Court answered in favour of the assessee the question whether Government subsidy received by the assessee would go to reduce the actual cost of its plant and machinery for the

purpose of depreciation and extra shift allowance and the value of its capital investment for the purpose of investment allowance - *CIT vs. Orissa Industries Ltd.* [SLP (Civil) No. 7372 of 1992].

On the same point special leave was granted in the following matters also on the dates and by Hon'ble judges mentioned against each item:

27.7.1992 : *CIT vs. Ankleshwer Inorganic Pigments & Chemicals Ltd.* against order dated 9.1.1992 of the Gujarat High Court in IT Appeal No. 175 of 1991, rejecting a reference application, SLP (Civil) No. 7840 of 1992: by their Lordship S. Ranganathan, V. Ramaswami and R.M. Sahai, JJ.

28.7.1992: *CIT vs. Annapurna Roller Flour Mills* against judgment dated 31.1.1992 of the Karnataka High Court in ITRC No. 33 of 1991, answering question referred against the department [SLP (Civil) No. 8064 of 1992]: by their Lordships S. Ranganathan, V. Ramaswami and B.P. Jeevan Reddy, JJ.

30.7.1992: *CIT vs. Progressive Engg.* against judgment dated 5.3.1992 of the Karnataka High Court in ITRC No. 17 of 1992, answering question referred against the Department [SLP(Civil) No. 8216 of 1992]: by their Lordships S. Ranganathan, V. Ramaswami and B.P Jeevan Reddy, JJ."

(1992) 197 ITR St. 1

Having regard to the facts that this question is now before the Supreme Court, we certify that this was a fit case for appeal to the Supreme Court u/s 261 of the Act.

There will be no order as to costs

Nure Alam Chowdhury, J. - I agree.

(1995) 126 Taxation 62 (All.)

IN THE HIGH COURT OF ALLAHABAD

(Before Hon'ble Mr. Justice Anshuman Singh &
Hon'ble Mr. Justice R.K. Gulati)

Civil Misc. Writ Petition No. 720 of 1993

Swamiji (Indra Prasad Gupta)

vs.

Commissioner of Income-tax

Decided on : 17.9.1993

REVISION OF ASSESSMENT — Assessments cancelled by the CIT u/s 263 — Assessee contending order u/s 263 not served — Assessee claiming assessments liable to be quashed since no justification for the CIT to set aside earlier assessments — Held,

alternate remedy available to the assessee — Order u/s 263 appealable to Tribunal — Writ petition dismissed on the ground of alternate remedy.

Income-tax Act, 1961 — Section 263

Consitution of India — Article 226.

FACTS

This petition is directed against the assessment orders for the A.Ys. 1978-79, 1979-80 and 1981-82 which are all dated 26.3.1993. Admittedly, the petitioner has filed appeals against the above assessment orders which are pending for decision before the Deputy Commissioner (Appeals), Varanasi. It may be observed that the above assessment orders came to be made in consequence of a common order u/s 263 of the Income-tax, Act, 1961 dated 24.2.1991 passed by the CIT (Central), Kanpur, by which he had set aside the assessment orders that had been made earlier for the aforesaid assessment years with the direction to make fresh assessments in the light of the directions contained in the order u/s 263. The complaint is that the assessments now made are liable to be quashed inasmuch as there was no justification for the CIT to have set aside the earlier assessments.

DECISION

The assessment order u/s 263 is admittedly appealable before the Tribunal. It seems that no such appeals were filed. The petitioner has an alternative effective statutory remedy against the order u/s 263, the Hon'ble court, therefore, did not feel inclined to go into the question whether the order u/s 263 had validly been made or not. With the above observations, the writ petition was rejected summarily on the ground of alternative remedy.

Full text of the Judgment is given below :

JUDGMENT

(R.K. Gulati, J.)

This petition is directed against the assessment order for the assessment years 1978-79, 1979-80 and 1981-82 which are all dated 26.3.1993. Admittedly, the petitioner has filed appeals against the above assessment orders which are pending for decision before the Deputy Commissioner (Appeals), Varanasi. It may be observed that the above assessment orders came to be made in consequence of a common order u/s 263 of the Income-tax Act, 1961 ('the act') dated 24.2.1991 passed by the CIT (Central), Kanpur, by which he had set aside the assessment orders that had been made earlier for the aforesaid assessment years with the direction to make fresh assessments in the light of the directions contained in the order u/s 263. The complaint is that the assessments now made are liable to

be quashed inasmuch as there was no justification for the Commissioner (Central) to have set aside the earlier assessments.

Now the assessment order u/s 263 is admittedly appealable before the Tribunal. It seems that no such appeals were filed. The plea taken is that the order under section 263 had not been served on the petitioner and, consequently, there was no occasion for the petitioner to have filed appeals before the Tribunal. A copy of the order passed by the Commissioner under section 263 was placed before us by the standing counsel and a copy was served in the Court on the petitioner who was present in person. Whether the petitioner was served with a copy of the order under section 263 in normal course or not, is essentially a question of fact and there are no pleading to that effect in the writ petition. Be that as it may, if the petitioner feels aggrieved against the order under section 263 setting aside the earlier set of assessment orders, it is for him to apply for a certified copy of the order under section 263 and to have recourse, if so advised, to the appellate forum or such other forum as may be available to him under the law. Suffice it to say that since the petitioner has an alternative effective statutory remedy against the order u/s 263, the Hon'ble court, therefore, did not feel inclined to go into the question whether the order u/s 263 had validly been made or not.

Insofar as the three assessment orders dated 26.3.1993 are concerned, as already stated, the petitioner has not availed only the alternative remedy by preferring appeals against those orders, but he is actually pursuing the appeals. In this view of the matter, we see no justification to permit the petitioner to abandon the course that he has adopted by filing appeals, and to challenge the assessment orders before this Court by means of the present petition. However, we do hope and trust that the Deputy Commissioner(Appeals), Varanasi, before whom the appeals are said to be pending, shall decide the appeals of the petitioner expeditiously at an early date, if possible, within a period of six months, a certified copy of this order is filed before the said authority.

With the above observations, the writ petition was rejected summarily on the ground of alternative remedy.

(1995) 126 Taxation 64 (Bom.)

IN THE HIGH COURT OF BOMBAY

(Before Hon'ble Justice Dr. B.P. Saraf & Hon'ble Mr. Justice D.R. Dhanuka)

IT Reference No. 152 of 1977

Commissioner of Income-tax

vs.

G.N. Agrawal

For the Appellant	: **Dr. V. Balasubramaniam and J.P.Devadhar**
For the Respondent	: **P.J. Pardiwala**
Decided on	: 25.8.1993

DEPRECIATION — Assessee owning certain trucks — Trucks under repair throughout the accounting period — Trucks used in business prior to repairs and after repairs — Assessee claiming depreciation — Held, assessee entitled to depreciation — Trucks continue to be used for business.

Income-tax Act, 1961 — Section 32.

FACTS & DECISION

During the relevant assessment years, some of the trucks were under repairs. The only controversy that is raised by the above question was as to whether the trucks could be said to have been not used for business of the assessee merely by reason of the same being under repairs. The Hon'ble court held that it did not require much discussion to answer the question. The answer is self-evident. The vehicles continued to be in use for business of the assessee even though the same were under repair. In this view of the matter, the Hon'ble court answered the question in the affirmative i.e., in favour of the assessee and against the revenue.

Full text of the Judgment is given below :

JUDGMENT

(D.R. Dhanuka, J.)

By this reference under section 256(1) of the Income-tax Act, 1961 ('the Act') the Tribunal has referred the following question of law to this Court for opinion at the instance of the revenue :

> "Whether, on the facts and in the circumstances of the case, the assessee is entitled to deduction for depreciation on the written down value of the trucks which were under repairs throughout the relevant accounting years but were used for the purpose of the business earlier and later?

We have heard the learned counsel for both the parties. The following facts clearly emerge from the record :

(i) The trucks in question were used by the assessee for the purpose of his business.

(ii) The said trucks were used for business of the assessee during the relevant years as well as earlier and later years.

(iii) During the relevant assessment years, some of these trucks were under repairs. The only controversy that is raised by the above question is as to whether the trucks can be said to have been not used for business of the assessee merely by reason of the same being under repairs. We do not think that much discussion is required to answer the question. The answer is self-evident. In our opinion, the vehicles continued to be in use for business of the assessee even though the same were under repair.

In this view of the matter, the question referred to us is answered in the affirmative, i.e., in favour of the assessee and against the revenue.

No order as to costs.

(1995) 126 Taxation 66 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta & Hon'ble Mr. Justice Shyamal Kumar Sen)

IT Reference No. 99 of 1991

Martin Burn Ltd.

vs.

Commissioner of Income-tax

For the Appellant	:	**None**
For the Respondent	:	**R.K. Bagchi and Sunil Kumar Mukherjee**
Decided on	:	13.10.1993

CAPITAL GAINS — Assessee acquiring lease hold rights in property — Assessee surrendering leasehold rights and receiving cash and also in exchange another property as owner — Held, assessee not incurring any cost for acquiring leasehold rights — Consideration received by it on surrender of rights could not be subjected to long term capital gain.

Income-tax Act, 1961 — Sections 2(14) and 48.

FACTS

The assessee company has an office in London. This office space was taken by the assessee company on lease for a period of 26 years. The Tribunal found that the assessee did not pay any premium at the time of acquiring the leasehold interest in the said property. The assessee company surrendered the lease hold interest on 20.9.1973 in favour of Central Land Investment Ltd. of London for a consideration of UK Pound 7,10,000. The said consideration was received by the assessee company partly in cash - UK Pound 3,10,000 and partly in the form of a property at Buckingham Street which was valued at UK Pound 4,00,000. The case of the assessee company is that the entire receipt of UK Pound 7,10,000 was a capital receipt not liable to tax.

DECISION

It is true that the lease-hold interest is a capital asset; since the same was acquired and held by the assessee without any cost of acquisition, the whole of UK Pound 7,10,000 is nothing but a capital receipt and, therefore, not chargeable to income in view of the principles laid down by the learned Judges of Supreme Court in *B. C. Srinivasa Setty's* case. We also find that this court had also taken a similar view in *CIT vs. Mangtu Ram Jaipuria* (1991) 192 ITR 533, following the decision of the Supreme Court in the said case. Respectfully following the said decision, the Hon'ble court answered question in this reference in the negative and in favour of the assessee.

Cases referred to :

1. *CIT vs. B.C. Srinivasa Setty* (1981) Taxation 60(3) 124 (SC); (1981) 128 ITR 294 (SC)
2. *CIT vs. Mangtu Ram Jaipuria* (1991) 192 ITR 533 (Cal.)
3. *A. Gasper vs. CIT* (1991) 192 ITR 382 (SC)

Full text of the Judgment is give below :

JUDGMENT

(Ajit K. Sengupta J.)

In this reference made at the instance of the assessee, the following questions have been referred by the Tribunal to this Court, under section 256(2) of the Income-tax Act, 1961 ('the Act'):

"1. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the cost of the lease-hold interest of the said premises to the assessee could be envisaged is based on any material ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was liable to capital gains on surrender of the tenancy rights of the said premises, although there was no cost of acquisition to the assessee for the said tenancy ?

3. Whether, on the facts and in the circumstances of the case, the finding of the Buckingham Street property worth UK Pound 4,00,000 is vitiated by reason of non-consideration of the relevant materials on record ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was right in determining the full value of the said consideration for surrender of the said tenancy of the premises by taking the value of Buckingham Street property at UK Pound 4,00,000 ?"

This reference relates to the income-tax assessment of the assessee company for the previous year ending 30.9.1974, corresponding to the assessment year 1975-76. The facts as found by the Tribunal are as under :

The assessee company has an office in London. This office space was taken by the assessee company on lease for a period of 26 years from Balfour Williamson & Co. Ltd. at a yearly lease rent of UK Pound 8,000 payable quarterly. The lease was effective from 12.2.1958. The Tribunal found that the assessee did not pay any premium at the time of acquiring the lease-hold interest in the said property. The Tribunal looked into the lease-hold agreement and recorded a finding of fact that the assessee was only to pay the lease rent of UK Pound 8,000 per annum payable quarterly and

that no other consideration either by way of premium or otherwise was payable by the assessee-company. The assessee company surrendered the lease-hold interest on 20.9.1973 in favour of Central Land Investment Ltd of London for a consideration of UK Pound 7,10,000. The said consideration was received by the assessee-company partly in cash - UK Pound 3,10,000 and partly in the form of a property at Buckingham Street which was valued at UK Pound 4,00,000.

The case of the assessee company is that the entire receipt of UK Pound 7,10,000 was a capital receipt and since the assessee had no cost of acquisition for the lease-hold interest acquired and held by it in its London office property, no part of the said sum of UK Pound 7,10,000 was chargeable to income tax. The assessee-company placed reliance on the decision of the Supreme Court in *CIT vs. B.C. Srinivasa Setty* (1981) 128 ITR 294.

We find that the Tribunal in this case recorded a finding of fact that the said lease-hold interest in London office was acquired by the assessee company without payment of any premium. The assessee was liable to pay only annual rent, which was payable quarterly, and there was no cost of acquisition whatsoever in respect of the said lease-hold interest acquired and held by the assessee. It is true that the lease-hold interest is a capital asset; since the same was acquired and held by the assessee without any cost of acquisition, the whole of UK Pound 7,10,000 is nothing but a capital receipt and, therefore, not chargeable to income in view of the principle laid down by the learned judges of Supreme Court in *B. C. Srinivasa Setty'* case (supra). We also find that this court had also taken a similar view in *CIT vs. Mangtu Ram Jaipuria* (1991) 192 ITR 533, following the decision of the Supreme Court in the said case.

There is now the decision of the Supreme Court precisely on the issue in *A. Gasper vs. CIT* (1991) 192 ITR 382. In that case the appellant since 1940 was a monthly tenant in a certain premises. It was a party to an agreement between the landlord and new lessees for leasing out the premises to the new lessees and permitting them to construct a new building thereon The appellant was paid a consideration of a lump sum for transferring his tenancy rights to the new lessees so as to clear the way for the new lessee to enter into the monthly lease and put up the construction. The sum received in consideration for surrender of the lease right was entirely brought to tax as capital gains for the assessment year 1967-68. It was the contention of the assessee before the Tribunal that the monthly lease was not acquired by the appellant at any ascertainable cost as no premium was paid and that even assuming the lease to be a capital asset, it was of such a nature that its cost of acquisition is not ascertainable. But the Tribunal took the view that since the appellant had not placed any material regarding the actual cost, the capital gains as computed were taxable without any further deduction. The assessee raised the question of the taxability of the sum

as capital gains in a reference petition before the Tribunal which the Tribunal rejected. But the assessee did not pursue the matter under section 256(2). Nor did the appellant urge before the High Court on a reference of other questions including a question which if widely interpreted might by implication carry consideration of the deduction permissible under section 48 of the Act. This High Court on the reference held that the appellant's lease-hold right was a capital asset and the amount received was assessable to tax as capital gains. Before the Supreme Court the appellant raised the contention that the monthly lease was not acquired by the appellant at any ascertainable cost and even assuming that it was a capital asset it was of such a nature that its actual cost of acquisition could not be ascertained. The Supreme Court did not, however, allow the contention to be raised as this could not be the issue in the appeal because the very question was raised before the Tribunal and was declined to be referred to the High Court by the Tribunal and the contention was neither raised nor argued before the High Court. However, the Supreme Court observed that in view of the decision of the Supreme Court in *B.C. Srinivasa Setty's* case (supra) the appellant had a good case. The Supreme Court in that connection observed that it may be open to the appellant to apply to the Board for relief by way of abstention from recovering the levy on the said sum and the Board would consider the application sympathetically. Thus, it was only for the technical reason that the assessee's contention did not succeed but in principle the Supreme Court expressed its agreement with the assessee's contention. In that light of the matter the question may now be taken as a closed one.

Respectfully following the said decision, we answer question No. 2 in this reference in the negative and in favour of the assessee.

In view of our answer to question No. 2 in favour of the assessee, it is not necessary to answer question Nos. 1, 3 and 4. We, therefore, decline to answer question Nos. 1, 3 and 4.

Shyamal Kumar Sen, J. - I agree.

(1995) 126 Taxation 70 (SC)

IN THE SUPREME COURT OF INDIA

(Before Hon'ble Justice Mr. B.P. Jeevan Reddy & Hon'ble Justice Mr. G.T. Nanavati)

Civil Appeal No. 2298 (NT) of 1977

Commissioner of Income-tax

vs.

Bijoy Kumar Almal

Decided on : 4-4-1995

COMPUTATION OF INCOME FROM PROPERTY — Assessee a co-owner in the property — Each co-owner claiming separate statutory allowance mentioned in section 23(2) — Revenue holding statutory allowance to be allowed only once and thereafter income to be distributed amongst the co-owners — Held, each co-owner entitled to deduction as claimed.

Income-tax Act, 1961 — Section 23(2).

FACTS

The relevant A.Y. is 1962-63. The respondent was the owner of an undivided 1/3rd share in a house property during the relevant period. He along with his brother another co-sharer was using the house for his own residence. In the respondent's assessment the ITO deducted the amount specified in sub-section (2) of section 23 from out of the annual letting value of the house and then apportioning the balance ALV amongst the co-owners. The respondent's case was that the deduction provided for by section 23(2) should be given separately to each co-owner. The Calcutta High Court decided in favour of the assessee and the revenue filed appeal against the judgment of the High Court.

DECISION

The Hon'ble Court held that in their opinion the language of section 26, even without taking into account the explanation, is clear enough. It provides that where property consisting of buildings (or buildings and lands appurtenant thereto) is owned by two or more persons and the respective shares are defined and apportionable, he shall not, in respect of such property, be assessed as association of persons and that the share of each person in the income from the property as computed in accordance with sections 22 to 25 shall be included in his total income. Sections 22 to 25 prescribe the manner in which the income from house property has to be determined. The Hon'ble Court, therefore, was of the opinion that the respondent was justified in claiming that the deduction provided for by section 23(2) be allowed to him separately from out of his share in the annual value of the house property, inasmuch as he had a definite and ascertainable share therein. Indeed this very idea is made clear beyond any doubt by the

explanation appended to section 26 by the amendment Act aforesaid. The appeal of the revenue was thus dismissed.

Cases referred to :

1. *CIT vs. Shyam Sunder* 122 ITR 541 (Bom.)
2. *Tulsi Das vs. CIT* (1983) 63 CTR 324 (Bom.)
3. *CIT vs. Shanti Devi Jalan* 139 ITR 152 (Cal.)

Full text of the Judgment is given below :

JUDGMENT

(B.P. Jeevan Reddy, J.)

This appeal is preferred by the Revenue against the judgment of the Calcutta High Court answering the question referred to it in favour of the assessee and against the revenue. The question referred under Section 256(1) of the Income-tax Act was "(Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the statutory allowance mentioned in Section 23(2) of the Income-tax Act, 1961 should be allowed every time separately in computing the income from house property falling to the share of each of the co-owners including the assessee?"

The assessment year relevant herein is 1962-63. The respondent was the owner of an undivided one-third share in a house property during the relevant period. He alongwith his brother and other co-sharers was occupying the house for his own residence. In the respondent's assessment, the ITO deducted the amount specified in sub-section (2) of Section 23 from out of the annual letting value of the house and then apportioned the balance A.L.V. among the co-owners. The respondent's case was that the deduction provided for by Section 23(2) should be given separately to each co-owner. It is the said dispute which is reflected in the question referred for the opinion of the High Court.

We may state immediately that such a dispute would not really arise after from the assessment year 1976-77 and onwards because of the insertion of explanation in Section 26. Disputes had arisen before the said explanation was inserted by Taxation Laws (Amendment) Act, 1975.

Section 22 provides that the annual value of property consisting of any buildings and lands appurtenant thereto of which the assessee is the owner, shall be chargeable to income-tax under the head 'Income from house property'. Section 23 prescribes the manner in which the annual value has to be determined. Sub-section (2), which is relevant for our purposes, provided that where the property consists of a house in the occupation of the owner for the purposes of his own residence, the annual value of such house shall first be determined in the same manner as if the property had been let and shall further be reduced by one-half of the amount so determined or one thousand and eight hundred Rupees, whichever is less.

Section 26, which is the other section relevant for our purpose, along with its explanation inserted with effect from 1-4-1976, reads thus :

"Property owned by co-owners.

26. Where property consisting of buildings or buildings and lands appurtenant thereto is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with sections 22 to 25 shall be included in his total income.

Explanation : For the purposes of this section, in applying the provisions of sub-section (2) of Section 23 for computing the share of each such person as is referred to in this section, such share shall be computed, as if each such person is individually entitled to the relief provided in that sub-section."

In our opinion, the language of Section 26, even without taking into account the explanation, is clear enough. It provides that where property consisting of buildings (or buildings and lands appurtenant thereto) is owned by two or more persons and their respective shares are definite and ascertainable, they shall not, in respect of such property, be assessed as Association of persons, and that the share of each such person in the income from the property as computed in accordance with Sections 22 to 25 shall be included in his total income. Sections 22 to 25 prescribe the manner in which the income from house property has to be determined. We are, therefore, of the opinion that the respondent was justified in claiming that the deduction provided for by Section 23(2) be allowed to him separately from out of his share in the annual value of the said house property, inasmuch as he had a definite and ascertainable share therein. Indeed, this very idea is made clear beyond any doubt by the explanation appended to Section 26 by the Amendment Act aforesaid.

It is brought to our notice that apart from the judgment under appeal (reported in 106 ITR 743), Delhi and Bombay High Courts have also taken a similar view in *CIT vs. Shyam Sunder* (122 ITR 541) and *Tulsi Das vs. CIT* [(1983) 63 CTR 324]. The Calcutta High Court itself appears to have followed the judgment under appeal in *CIT vs. Shanti Devi Jalan* (139 ITR 152).

The appeal accordingly fails and is dismissed. No costs.

(1995) 126 Taxation 73 (Del.)

IN THE HIGH COURT OF DELHI

(Before Hon'ble Justice Mr. D.P. Wadhwa & Hon'ble Justice Dr. M.K. Sharma)

I.T.C. No. 21 of 1994

Commissioner of Income-tax

vs.

Shri Moti Lal Sharma

For the Appellant	:	**B. Gupta**
For the Respondent	:	**C.B. Aggarwal**
Decided on	:	22-2-1995

REFERENCE TO HIGH COURT — Assessee received Rs. 21 lakhs from his employer for getting enhanced compensation under Land Acquisition Act — Amount taxed by revenue but deleted by Tribunal — ITO imposing penalty for default u/s 273(2)(a) — Penalty also deleted since the addition in quantum deleted — Reference application and quantum rejected — Hon'ble Court directing Tribunal to refer the question in quantum assessment — Held, the basis on which penalty was deleted was the quantum assessment which ordered to be referred, the question of deletion of penalty also to be referred.

Income-tax Act, 1961 — Section 256(2).

FACTS

The assessee filed a return of income of Rs. 1,69,153/- for the A.Y. 1987-88 which was accepted u/s 143(1). Subsequently the Assessing Officer came to learn that the assessee had during the previous year ending on 31-3-1987 received a sum amounting to Rs. 21 lakhs from his employer for rendering valuable service to them for getting enhanced compensation under the Land Acquisition Act, 1894. Accordingly, action u/s 147(a) was taken and the aforesaid amount of Rs. 21 lakhs was added to the income of the assessee. During the course of assessment proceedings a show cause notice was issued for levy of penalty u/s 273(2)(a) and a penalty of Rs. 81,211/- was imposed. This penalty was upheld by CIT(A) but the same was deleted by the Tribunal since in the quantum assessment the Tribunal had held that the amount of Rs. 21 lakhs was only a gift to the assessee by his employer. In the quantum assessment the Tribunal also dismissed the reference application u/s 256 and the revenue's application u/s 256(2) was pending. The Tribunal also refused to refer the matter in regard to penalty. The Hon'ble Court in the quantum assessment had directed the Tribunal to refer the matter in regard to quantum u/s 256(2).

DECISION

The Hon'ble Court held that the Tribunal was persuaded to cancel the penalty imposed on the ground that the basis of which penalties were imposed had been deleted in the quantum assessment. However, since the Hon'ble Court had directed to refer the matter in quantum, the question of imposition of penalty was also ordered to be referred.

Full text of the Judgment is given below :

JUDGMENT

(Dr. M.K. Sharma, J.)

In this petition under section 256(2) of the Income-tax Act, 1961 (hereinafter referred to as the Act) the Revenue seeks a direction to the Tribunal to refer the following question of law of the opinion of this Court :-

> "Whether, on the facts and in the circumstances of the case the ITAT has correct in law in cancelling the penalty imposed u/s 273 (2) (a) of the Income-tax Act, amounting to Rs. 81,211/-".

2. The assessee filed a return of income of Rs. 1,69,153/- for the assessment year 1987-88 which was accepted as such by the Income-tax Officer under Section 143(1) of the Act. Subsequently the Assessing Officer came to learn that the assessee had during the relevant previous year ending on 31-3-1987 received a sum amounting to Rs. 21,00,000/- from his employers for rendering valuable services to them for getting enhanced compensation under the Land Acquisition Act, 1894. Accordingly, action under Section 147(a) was taken and the aforesaid amount of Rs. 21,00,000 was added to the income of the assessee after conducting and enquiry to that effect.

3. During the course of the aforesaid assessment proceedings the Assessing Officer being satisfied about the default of the assessee under Section 273(2)(a) of the Act issued show cause notices to the assessee and finally a penalty order under Section 273(2)(a) was made imposing penalty of Rs. 81,211/-. The assessee being aggrieved filed an appeal against the penalty imposed, before the CIT (Appeals) who upheld the penalty holding that the assessee intentionally furnished an estimate of advance tax which he knew and had reason to believe to be untrue. That in the quantum assessment in the meantime the addition made by the Income-tax Officer of an amount of Rs. 21,00,000/- to the income of the assessee came to be deleted by the Income-tax Appellate Tribunal, on an appeal being filed by the assessee, holding the same to be a gift to the assessee by his employers against which an application under Section 256(1) was preferred before the Tribunal. The said application filed under Section 256(1) of the Act having been rejected by the Tribunal the Revenue preferred a petition before this court under Section 256(2) of the Act which was registered and numbered as ITC No. 1/1994. This court after hearing the learned counsel

for the parties has passed an order directing the Income-tax Tribunal to refer the question formulated in the said petition under Section 256(2) of the Act to this court alongwith the statement of the case.

4. The assessee being aggrieved by the order of the C.I.T. (Appeals) upholding the penalty imposed under Section 273(2) of the Act filed an appeal before the Income Tax Appellate Tribunal. When the aforesaid matter came up for hearing before the Income Tax Appellate Tribunal, the quantum appeal was already decided by the Income Tax Appellate Tribunal as aforesaid, and the amount was deleted by the Tribunal in the quantum assessment. In view of the aforesaid factual position the Tribunal cancelled the penalties imposed in view of the fact that the basis on which penalties were imposed had already been deleted by the Tribunal in the quantum assessment and directed the Assessing Officer to refund the amount of penalty in case the same had been recovered.The Revenue being aggrieved filed a petition under section 256(1) seeking reference on the question of law quoted hereinabove before the Tribunal which was dismissed by the Tribunal on the ground that the findings recorded by the Tribunal were one of fact and no question of law arose. Hence this application.

5. We find from the order of the Tribunal that it was persuaded to cancel the penalties imposed on the ground that the basis on which the penalties were imposed had been deleted by the Tribunal in quantum assessment. However, by our judgment in ITC No. 1/1994 delivered today we have directed the Tribunal to refer the question of law arising out of the order of the Tribunal for the opinion of this court with a statement of case. In view of the facts and circumstances of the case and in view of our judgment and order calling for a reference on the quantum appeal to refer to this court a statement of case on the question of law framed therein, we are of the opinion that a question of law does arise in this case and accordingly we direct the Tribunal to refer to this Court the question formulated in paragraph 1 of the petition under Section 256 (2) of the Income-tax Act and quoted hereinabove for the decision of this court alongwith the statement of the case. The petition is thus disposed of.

(1995) 126 Taxation 76 (Del.)

IN THE HIGH COURT OF DELHI

(Before Hon'ble Justice Mr. D.P. Wadhwa & Hon'ble Justice Dr. M.K. Sharma)

ITC No. 138 of 1992 & ITC No. 92 of 1992

Commissioner of Income-tax

vs.

M/s Mehta Electrosteel Ltd.

For the Appellant	:	**B. Gupta**
For the Respondent	:	**S.K. Aggarwal**
Decided on	:	8-3-1995

REFERENCE — Tribunal holding liability of surcharge on electricity being a statutory liability to be allowable even though disputed — Tribunal further holding that in view of provisions of Section 40A(2) and also on fact the assessee was entitled to the deduction for pickling and annealing charges @ Rs. 1250/- as against Rs. 2,500/- claimed — Both the revenue and assessee approaching Tribunal for reference to High Court — Reference application dismissed — Held, no referable question of law arose out of the order of Tribunal — Both the petitions dismisse.

Income-tax Act, 1961 — Section 256(2).

FACTS

The brief facts common to both the applications are that the assessee company was engaged in the manufacture of steel strips and box strips. It also does job work of annealing and pickling as well as rolling. A claim of Rs. 10,94,326/- on account of surcharge in respect of electricity consumed was disallowed. On appeal the CIT(A) confirmed the disallowance and on further appeal by the assessee the Tribunal allowed the claim of the assessee holding that the liability in question was statutory one and not contractual and that the liability relates to the accounting year and arose during the year.

Further the assessee claimed to have paid to M/s Haryana Steel Products about Rs. 20 lakhs for annealing and pickling. This amount was debited under the head salaries and wages. The Assessing Officer found that M/s Haryana Steel Products was a proprietary concern of the family trust of Shri M.K. Mehta, a Director of the company and that a trust has been created for th benefit of wife, children and grand children of Shri M.K. Mehta. The ITO considered payment of Rs. 2,500/- per M.T. paid to M/s Haryana Steel Products as excessive and unreasonable and accordingly the rate of Rs. 600 per M.T. was considered as reasonable rate. On appeal, the CIT(A) allowed the claim of Rs. 1250/- per M.T. which was upheld by the Tribunal. The Tribunal also considered that

the provisions of Section 40A(2) were applicable. Both the revenue and the assessee filed reference applications which were rejected. Both the assessee and revenue have approached the Hon'ble High Court for a direction to the Tribunal to refer the questions.

DECISION

As regards the claim of revenue, the Hon'ble court held that no question of law arose out of the order of the Tribunal and as such dismissed the application of the revenue. As regards the reference application of the assessee, the Hon'ble Court held that the dispute sought to be raised by the assessee in the present case was covered by the ratio of the Apex court in the case of *Upper India Publishing House Pvt. Ltd. vs. CIT* 117 ITR 569 and the decision of this court in the case of *CIT vs. Northern India Iron & Steel Co. Ltd.* reported in 179 ITR 599. The Hon'ble Court thus held that no question of law arose and the petition of the assessee was also dismissed.

Cases referred to :

1. *CIT Delhi vs. Northern India Iron & Steel Co. Ltd.* (1989) Taxation 95(3) - 383; 179 ITR 599 (Del.)
2. *CIT vs. M/s Mohta Electrio Steel Ltd.*
3. *Upper India Publishing House P. Ltd. vs. CIT* 117 ITR 569 (SC)

Full text of the Judgment is given below :

JUDGMENT

(Dr. M.K. Sharma, J.)

As the two applications filed under Section 256(2) of the Income-tax Act, by the revenue and assessee respectively, arise out of the same assessment year, namely, 1983-84 and also from the same facts, we propose to dispose of the two applications by the common judgment and order.

Both the applications relate to the assessment year 1983-84.

In the application filed by the Revenue under Section 256(2) of the Income-tax Act, the following questions said to be questions of law are sought to be referred to this Court for its opinion :-

1. Whether, on the fact and in the circumstances of the case the ITAT is right in law in holding that the liability of Rs.10,94,326/- on account of surcharge on the electricity consumed was a statutory liability and was an allowable deduction even though it was disputed?
2. Whether, the ITAT had any material to hold that the monthly bills which included the disputed charges were presented to the assessee in all the earlier months and the entire amount of Rs. 10,94,326 claimed as a deduction pertained to the accounting year relevant

in the assessment year 1983-84 and that the liability had accrued during the year.

3. Whether, on the facts and in the circumstances of the case, the order of the ITAT that both annealing and pickling was done for consignments where the time tables as recorded in challan, was less than 50 minutes is legally correct and based on any evidence, when in the demonstration run of the machinery, the minimum time for these activities was recorded as 50 minutes per MT ?

4. Whether, on the facts and in the circumstances of the case, the ITAT is right in law in holding that the assessee was entitled to the deduction for pickling and annealing charges @ Rs. 1250/- per MT in respect of all the consignments sent to HSP?

The brief facts common to both the applications are that the assessee company was engaged in the manufacture of steel strips and box strips. It also does job work of annealing and pickling as well as rolling. A claim of Rs. 10,904,326/- of the assessee on account of surcharge in respect of electricity consumed was disallowed by the Assessing Officer. On appeal of the assessee CIT(A) confirmed the disallowance whereas on a further appeal by the assessee the Tribunal allowed the claim of the assessee holding that the liability in question was statutory one and not contractual and that the liability relates to the account year and arose during the year.

On the other hand, the assessee claimed to have paid to M/s. Haryana Steel Products about Rs. 20/- lakhs for annealing and pickling. This account was debited under the Head Salaries and Wages. The Assessing Officer found that Haryana Steel Products was a proprietary concern of a family trust of Shri M.K. Mohta, a Director of the Company and that the trust has been created for the benefit of wife, children and grand children of Shri M.K. Mohta. The Assessing Officer considered the payment of Rs. 2,500/- per mt paid to M/s Haryana Steel products as excessive and unreasonable and accordingly, the rate of Rs.600/- as reasonable rate. The assessee being aggrieved, appealed to CIT(A) who after consideration of the parties of the assessee found that Rs. 2,500/- as excessive and held Rs. 1.250/- per mt as reasonable. Against the aforesaid findings of the CIT(A) both the assessee and the revenue came on appeal before the Tribunal. Considering the facts and circumstances of the case the Tribunal upheld Rs. 1,250/- per m.t. as reasonable. The Tribunal also considered as to whether the provisions of Section 40-A(2) are attracted in this case or not and on consideration of the same came to a finding that the consideration of the same came to a finding that the payment was made to a trust called Krishna Mohta Kosh. The settler of the trust was foud to be Yagya Bhu and the beneficiaries included children of the settler and the wife, grand children of Mr. M.K. Mohta and their spouses and Shri K.K. Mohta was found to be one of the Directors of the Company and accordingly,

the Tribunal held that as the payment to Haryana Steel Products was found to be the trustees where the beneficiaries are relations of the Director, the provisions of Section 40A(2) were applicable.

The Revenue being aggrieved by the order of the Tribunal in ITA No. 1067/ Del of 1988, filed an application before the Tribunal under Section 256(1) of the Income-tax Act, 1961for referring the aforesaid four questions arising out of the assessment year 1983-84 for the opinion of this Court, which after due consideration by the Tribunal was rejected holding the aforesaid questions as questions of fact. Accordingly, this application has been preferred by the revenue.

We have heard the learned counsel for the Revenue as also the learned counsel for the assessee.

It is contended by the learned counsel for the revenue that all the four questions sought to be raised in this application are questions of law and that Tribunal was wrong in coming to the contrary conclusion. We have been taken through the contents of the questions No. 1 and 2 and on perusal of the same, we find that the finding recorded by the Tribunal to the effect that electric surcharge is a statutory liability is by now a settled issue.

The learned counsel appearing for the Revenue also could not dispute about the correctness of the aforesaid findings. In that view of the matter, in our opinion , the answer to the said question would be mere academic and self evident and no useful purpose would be served by calling a reference on those questions which are also based on findings of fact.

We, therefore, decline to call for reference on the aforesaid two questions.

With regard to the other two questions, namely, in questions No.3 & 4, in our opinion, are covered by decisions of this Court in the case of *Commissioner of Income-tax, Delhi III vs. Northern India Iron and Steel Co. Ltd.* reported in ITR 179 page 599 and also in ITC No. 139/92, *Commissioner of Income-tax vs. M/s. Mohta Electrio Steel Ltd.*, decided on 28th September, 1994 and in ITC No. 86/93, *Commissioner of Income-tax vs. M/s Mohta Electro Steel Ltd.*, decided on 13th December, 1994.

Accordingly, therefore, in our opinion, no question of law arises out of questions No.3 and 4 also and therefore, we decline to call for reference on the aforesaid two questions as well.

In the result, the application filed by the Revenue stands dismissed.

Now coming to the application filed by the assessee under Section 256(2) of the Income-tax Act, 1961 in respect of the assessment year 1983-84 the assessee seeks to refer for the opinion of this Court, seven following questions as questions of law.

While issuing notice by this Court on 6th August, 1992 on the aforesaid application filed by the assessee questions No.2 to 7 were held to be

questions of fact and notice was issud by this Court to the respondents restricted only to question No.1. Therefore, in the present application, we have only to consider as to whether the question No.1 as set out in the application filed by the assessee, is a question of law and whether the said question is fit to be referred to this Court for its opinion. We set out the said question hereunder :

1. Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that provisions of section 40A(2) were attracted?

We have heard the learned counsel for the assessee as also the learned counsel for the Revenue.

It is contended by the learned counsel for the assessee that the question of law sought to be raised is a question to law and the Tribunal was wrong is not referring the same to his Court for its opinion. The learned counsel appearing for the Revenue during the course of his arguments relied upon the decision of Apex Court in the case of *Upper India Publishing House P. Ltd. vs. Commissioner of Income-tax, Lucknow* reported in ITR 117 page 569 and also decision of this Court in *Commissioner of Income-tax, Delhi III vs. Northern India Iron and Steel Co. Ltd.* reported in ITR 179 page 599. The dispute sought to be raised by the assessee in the present petition appears to be covered by the ratio of the aforesaid two decisions. We are of the opinion that no question of law arises out of question No.1 and therefore, the Tribunal was right in coming to the conclusion that no question of law has arisen therefrom. Under the aforesaid circumstances, the application filed by the assessee also stands dismissed.

(1995) 126 Taxation 80 (Del.)

IN THE HIGH COURT OF DELHI

(Before Hon'ble Justice Mr. D.P. Wadhwa &
Hon'ble Justice Dr. M.K. Sharma)

I.T.C. No. 29 of 1994

Director of Income-tax (Exemptions), New Delhi
vs.
M/s Goyal Charitable Trust

For the Appellant : **R.C. Pandey**
For the Respondent : **M.S. Syali**
Decided on : 13-3-1995

REFERENCE TO HIGH COURT — Assessee trust getting enhanced compensation and interest — Govt. filing appeal against the order granting enhanced compensation — Enhanced compensation and interest withdrawn by furnishing bank guarantee subject to decision of appeal — Revenue taxing the same — *Tribunal deleting the*

amount of interest and compensation — Revenue filing reference application — Reference application rejected — Revenue filing application before the High Court for direction to refer the case — Held, the issue already covered by the judgment of apex court — Reference if ordered only academic in nature — Petition dismissed.

Income-tax Act, 1961 — Section 256(2).

FACTS

The assessee is a trust which came into existence under a trust deed dated 1-9-1973. Shri Om Prakash Goel and Shri Hari Shankar Goel who were brothers owned certain lands which were acquired by the Govt. of Madhya Pradesh and compensation was awarded by Land Acquisition Collector. Since the compensation was considered inadequate, appeals were filed and the Additional Judge enhanced the compensation. The Govt. filed appeal before the High Court which was pending. In the previous year relevant to A.Y. 1983-84, the assessee received by way of interest as compensation and the said amount was shown as a liability in the balance sheet. Similarly, for A.Y. 1984-85, a sum of Rs. 38,913 was withdrawn by way of interest and was shown as a liability. The revenue taxed this amount of interest but the Tribunal deleted the same. Being aggrieved, the revenue sought reference which was dismissed. The present application has been filed by revenue for a direction to the Court to refer the question if the amount of interest and compensation was taxable.

DECISION

The Hon'ble Court held that on consideration of the record it was found that the trust was allowed to withdraw the enhanced compensation deposited in court by furnishing a bank guarantee for the amount of compensation as also for the future interest which is a subject matter in the present case. In view of the aforesaid facts no right to receive future interest as also enhanced compensation by the assessee which is still unsettled arose to the assessee. Further this issue had already been decided by the Apex court in the case of *CIT vs. Hindustan Housing Land Development Trust Ltd.* 161 ITR 524 and a decision of this court in *Harish Chandra and Others vs. CIT* 154 ITR 457. The question sought to be referred was thus merely academic. The petition of the revenue was dismissed.

Cases referred to :

1. *CIT vs. Hindustan Housing land Development Trust Ltd.* (1986) Taxation 82(2)-80; 161 ITR 524 (SC)
2. *Harish Chandra & Others vs. CIT* (1988) Taxation 76(1)-27 (Del.); 154 ITR 457 (Del.)

Full text of the Judgment is given on next page :

JUDGMENT

(Dr. M.K. Sharma, J.)

This reference application under Section 256(2) of the Income-tax Act has been filed by the revenue praying for a direction requiring the Tribunal to draw up a statement of the case and refer the following question said to be a question of law arising out of the combined order of the Tribunal in ITA No. 1874 and 2898/1987 relevant to the assessment years 1983-84 and 1984-85 :-

> "Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in dismissing the departmental appeal and holding that the interest accrued on compensation could be assessable only after the enhanced compensation had been finally determined with the interest earned by the assessee during the year under consideration had nothing to do with the compensation/enhanced compensation?"

Briefly stated, the facts of the case are that the assessee is a Trust which came into existence under a deed of trust dated 1-9-1973. Shri Om Prakash Goel and Shri Hari Shankar Goel who were brothers owned certain lands which were acquired by the Government of Madhya Pradesh under the Land Acquisition Act and compensation was awarded by the Land Acquisition Collector. The compensation was considered to be inadequate by the owners of the land and accordingly a reference being sought for was made to the First Additional Judge, Gwalior for the enhancement of the compensation. The Additional Judge enhanced the compensation against which an appeal was filed by the State Government before the High Court of Madhya Pradesh. In the said appeal, it appears that there was a difference of opinion between the two learned Judges hearing the appeal regarding the fixation of the quantum of compensation and the matter was referred to a third Judge for final decision.

The assessee Trust was made a party to the proceedings before the High Court in the appeal and the trust was allowed to withdraw the enhanced compensation deposited in the court by furnishing a bank guarantee for the amount of compensation and future interest. In the previous year relevant to the assessment year 1983-84, the assessee trust received an amount of Rs. 6,53,614/- by way of interest on the compensation and the said amount was shown by the assessee as a liability in the balance sheet. Similarly for the assessment year 1984-85 a sum of Rs. 38,913/- was withdrawn by way of interest and this amount was also shown as liability. Although none of the aforesaid amounts was shown as income in the respective assessment years by the assessee the Income-tax Officer while passing the orders of assessment held that the interest income of the assessee was income of the assessee trust and brought the same to tax in the respective assessment years. The assessee being aggrieved thereby filed an appeal before the Commissioner of Income-tax (Appeals), who after considering the

submissions made by the respective parties held that the interest on the compensation amount could not be brought to tax and accordingly deleted the addition made by the Income-tax Officer. Appeal having been filed therefrom by the Revenue the Income-tax Appellate Tribunal upheld the decision and the view taken by the DIT (Appeals). Thereafter an application under Section 256(1) of the Income-tax Act having been filed by the revenue for requiring the Tribunal to draw up a statement of case and refer the aforesaid question to this court for its opinion the Tribunal dismissed the said application holding that no referable question of law arose out of the order of the Tribunal.

We have heard the learned counsel for the Revenue as also for the assessee. Our attention has been drawn to a decision of the Apex Court in the case of *Commissioner of Income-tax, West Bengal II vs. Hindustan Housing Land Development Trust Limited* reported in 161 ITR 524 and a decision of this court in *Harish Chandra and Others vs. Commissioner of Income-tax* reported in 154 ITR 457. On perusal of the orders passed by the learned Tribunal we find that the learned Tribunal came to the conclusion that no referable question of law arose out of the order of the learned Tribunal in view of the fact that the answer to the aforesaid question has already been finally concluded by the decision of the Apex Court (supra) which only was applied by the Tribunal in deciding the appeal.

The learned counsel for the revenue submitted before us that what has been held on the aforesaid two decisions of the Apex Court and this court is with regard to compensation for acquisition and not the interest. According to him as there is no conclusive decision of any court with regard to the question of interest earned by the assessee during the year under consideration the question of law does arise out of the question sought to be referred.

We have given our anxious consideration to the submissions made by the counsel for the parties. On consideration of the record we find that the assessee trust was allowed to withdraw the enhanced compensation deposited in court by furnishing bank guarantee for the amount of compensation as also for the future interest which is the subject matter in the present case. In view of the aforesaid fact, we are of the opinion that the right to receive the future interest as also the enhanced compensation by the assessee is still unsettled inasmuch as the assessee has been directed to withdraw the future interest also alongwith the enhanced compensation on furnishing security for restitution. Accordingly, the withdrawal of the interest portion by the assessee as contingent inasmuch as there is a possibility of the said amount to be returned by the assessee in the event of the acceptance of the appeal of the Government.

It is thus apparent that the principles laid down by the Apex Court and by this Court (supra) are also applicable to the facts and circumstances of

the present case. In view of the same the answer to the proposed question appears to be academic and self-evident and no useful purpose would be served, in our opinion, in calling for a reference on the aforesaid question. Accordingly, this petition has no merit and is dismissed. No costs.

(1995) 126 Taxation 84 (Gau.)

IN THE HIGH COURT OF GAUHATI

(Before Hon'ble Justice Mr. Manisana & Hon'ble Justice Smt. M. Sarma)

IT Reference No. 17 of 1990

Lalsingh Estate (P) Ltd.

vs.

Commissioner of Income-tax

For the Appellant	:	**D.N. Choudhury and V.K. Bhatra**
For the Respondent	:	**D.K. Talukdar and B.J. Talukdar**
Decided on	:	19-11-1993

M A MEMBER OF THE HUF TRANSFERRING CERTAIN LAND TO COMPANY IN LIEU OF SHARES ALLOTTED TO DIFFERENT MEMBERS AND PARTLY FOR CASH — After death of M widow challenging the deed on the ground that M not capable of transferring the property — Assessee company passing a resolution transferring possession of land to four members of the family as tenants-in-common and relegating existing tenants to position of sub-tenants by surviving members — Subsequently assessee company executing a lease deed in favour of HUF relinquishing its entire right, title and interest in the property — Revenue assessing income of property in the hands of the assessee company — Held, property transferred by 'M' for valuable consideration — Transfer valid — Any member of the HUF could not invalidate sale by M — Release deed executed by company did not have any consideration — Income from property assessable in the hands of the assessee company.

Income-tax Act, 1961 — Section 22.

FACTS

Shri M. Lal Singh made an affidavit on 11-4-1959 declaring that he was the karta of HUF consisting of five members who had formed a private limited company; that the land under two periodic pattas bearing Nos. 201 and 1398 of Guwahati town issued in his name would be transferred to the assessee company to secure the interest of the members for the use and maintenance of the whole joint family; and that the land was for the use and maintenance of the joint family. The assessee company was registered on 23-6-1959 with an authorised capital of

Rs. 2 lakhs and the shareholders as on 30-6-1959 were five members. They were M. Lal Singh, Smt. Amrit Kaur, Smt. Ikbal Kaur, Smt. Gurbachan Kaur and Shri T.N. Singh. In other words, the assessee company was formed by the members of joint family as was declared in the affidavit. It appears that, on 2-3-1962, M. Lal Singh transferred the land with structures standing thereon to the assessee company for a consideration of Rs. 1,10,000/- of which Rs. 5,000/- was paid in cash to M. Lal Singh and balance of Rs. 1,05,000/- was to be paid in the form of shares which were to be allocated at the direction of Shri M. Lal Singh. Accordingly, the shares were allocated as under: M. Lal Singh 750 shares valued at Rs. 75,000/-, Smt. Amrit Kaur 250 shares valued at Rs. 25,000 and Smt. Gurbachan Kaur 50 shares valued at Rs. 5,000/-. M. Lal Singh died on 19-1-1961. Before his death, he was assessed as an individual. On 25-12-1963, Smt. Amrit Kaur, widow of Lal Singh, after the death of her husband challenged the sale deed executed on 2-3-1960 by M. Lal Singh as invalid on the ground that the property mentioned in the deed belonged to the HUF. On 25-10-1963, the assessee company passed a resolution to transfer the possession of the said land to the 4 surviving members of the joint family, namely Smt. Amrit Kaur (widow), Smt. Ikbal Kaur, Smt. Gurbachan Kaur and Shri T.N. Singh, by treating them as tenants under the assessee company on nominal rental of Rs. 4,000/- per annum and relegating the existing tenants occupying the same property to the position of sub-tenants under the aforesaid members of the joint family who could realise the rent from the sub-tenants. In terms of various resolutions adopted by the assessee company, Smt. Amrit Kaur on behalf of the assessee company executed a deed of release on 3-10-1966 in favour of the HUF. The A.Ys. are of 1962-63 to 1969-70. The Assessing Officer held that M.L. Singh was the absolute owner of the land and it was validly transferred by him to the assessee company and, therefore, the land and building standing thereon belonged to the assessee company despite the so-called release deed. The AAC, on appeal, confirmed the orders of all A.Ys. The Tribunal also observed that M.L. Singh was the absolute owner of the land and building, not the HUF; that the transfer of property made by M.L. Singh to the assessee company could not be challenged; that there was no evidence that the joint family did not at all exist; that joint family had no locus standi to question the transfer, and that the release deed was without any lawful authority as the joint family did not own the property. Thereafter, the Tribunal held that the release deed was neither based on facts nor on law and, therefore, it was merely a vehicle of tax evasion and instrument to circumvent tax obligations. The question which arose for consideration was whether the deed of release in question was not lawful in the sense that it was used for tax evasion or to circumvent tax obligations.

DECISION

Considering the terms of reference we proceed with the case assuming that M.L. Singh was the karta of HUF. He had not stated in the affidavit that the land and building standing thereon were joint family properties. In the plaint of Title Suit No. 84 of 1950 filed by M.L. Singh, he stated that he was the owner of the land under Dag No. 1342 of periodic patta No. 201. Since the land and the structures standing thereon were in the name of M.L. Singh, it shall be presumed that they were individual properties of M.L. Singh. It is true that from the juristic point of view a company registered under the Indian Companies Act and the HUF are separate legal personalities or entities, that is to say, a company is entirely distinct from HUF. In the present case, the shareholders of the assessee company and the members of the HUF were/are the same persons. During the lifetime of M.L. Singh, the profits or benefits from the properties were enjoyed by the company of the five members of the joint family as shareholders of the assessee company, for more than 2 years by making additional constructions and also alteration of the then existing building. But on the objection of Smt. Amrit Kaur that the properties in question were the joint family properties and the sale was invalid, the assessee company took decision to transfer the possession of the properties by treating the surviving members of the HUF as tenants under the assessee company. If the surviving members of the HUF were treated as tenants under the assessee company in respect of properties in question, how any of the members of the HUF could assert title against the assessee company. That apart, if the sale of the properties by M.L. Singh to the assessee company was nullified by the assessee company at the instance of Amrit Kaur, M.L. Singh or his heirs are to pay back the money received by M.L. Singh, as the price of the properties, to the assessee company. There is no material to show such re-payment to the assessee company. Therefore, the decision of the assessee company to transfer the possession of the properties was for the purpose of securing some other advantage, say, evasion of tax. It is settled that law does not permit a person to approbate and reprobate. No part can accept and reject the same instrument, that is to say, a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage (as held in the case of *R.N. Gosain vs. Yashpal Dhir* AIR 1993 SC 352). Proceeding further, there is no bar to conveying or transferring the land to HUF by the assessee company in the circumstances of the case. The question which, therefore, arises for consideration is whether the deed of release executed by Smt. Amrit Kaur will operate as conveyance. In view of the decision of the Supreme Court in the case of *Thayyil Mammo vs. Kottiath Ramunni* (AIR 1966 SC 337) it follows that a deed of release or instrument styled as release deed, in a given case, may operate as a conveyance if it clearly

discloses an intention to effect a transfer for valuable consideration. Therefore, the deed of release in question should be for valuable consideration in order that it may operate as a conveyance. The release deed does not indicate the consideration amount. It does not mention how Rs. 1,10,000/- was repaid by the HUF to the assessee company. Clause (2) of the deed indicates only the mutual agreement and settlement of claim of the HUF for the alleged unlawful use and occupation by the assessee company. Clause (3) of the deed indicates the mutual agreement and settlement of claim to mutual satisfaction of the parties in respect of the alleged unlawful use and occupation. Therefore, the deed of release does not show consideration. For these reasons, the deed of release does not operate as transfer or conveyance. On the facts and in the circumstances of the case, the deed of release was not lawful for the purpose of taxing statute. In that view of the matter, the question referred to is answered in the affirmative i.e. in favour of the revenue.

Cases referred to :

1. *CIT vs. B.M. Kharwar* (1969) 72 ITR 603 (SC)
2. *CIT vs. Sri Meenakshi Mills Ltd.* (1967) 63 ITR 609 (SC)
3. *R.N. Gosain vs. Yashpal Dhir* AIR 1993 SC 352
4. *Thayyil Mammo vs. Kattiath Ramunni* AIR 1966 SC 337
5. *Kuppuswami Chettiar vs. A.S.P.A. Arumugam Chettiar* AIR 1967 SC 1395
6. *Jugglial Kamalapat vs. CIT* (1969) 73 ITR 702 (SC)

Full text of the Judgment is given below :

JUDGMENT

(Mantsana, J.)

In this reference under section 256(2) of the Income-tax Act, 1961 ('the Act') the following question has been referred to us by the Tribunal :

> "Whether, on the facts and in the circumstances of the case, on the basis of the material and documents produced, the Tribunal was justifed in law in holding that the registered deed of release dated 3-10-1966 was not a lawful document and that the income from the properties was assessable in the hands of the assessee-company and not in the hands of the Hindu undivided family."

Sri M. Lal Singh made an affidavit on 11-4-1959 declaring that he was the Karta of HUF consisting of five members who had formed a private limited company (which we shall refer to as the 'assessee-company'); that the land under two periodic pattas bearing Nos. 201 and 1398 of Guwahati town issued in his name would be transferred to the assessee-company to secure the interest of the members for the use and maintenance of the

whole joint family; and that the land was for the use and maintenance of the joint family. The assessee-company was registered on 23-6-1959 with an authorised capital of Rs 2 lakhs and the shareholders as on 30-6-1959 were five members. They were M. Lal Singh, Smt. Amrit Kaur, Ikbal Kaur, Smt. Gurbachan Kaur and Sri T.N. Singh. In other words, the assessee-company was formed by the members of joint family as was declared in the affidavit. It appears that, on 2-3-1960, M. Lal Singh transferred the land and structures standing thereon to the assessee-company for a consideration of Rs. 1,10,000, of which Rs. 5,000 was paid in cash to M.Lal Singh and balance of Rs. 1,05,000 was to be paid in the form of shares which were to be allocated at the direction of Sri. M. Lal Singh. Accordingly, the shares were allocated as under M.Lal Singh 750 shares valued at Rs. 75,000; Smt. Amrit Kaur 250 shares valued at Rs. 25,000; and Smt. Gurbachan Kaur 50 shares valued at Rs. 5,000. M Lal Singh died on 19-1-1961. Before his death, he was assessed as an individual. On 25-12-1963, Smt. Amrit Kaur, widow of Lal Singh, after the death of her husband challenged the sale deed executed on 2-3-1960 by M.Lal Singh as invalid on the ground that the property mentioned in the deed belonged to the HUF. On 25-10-1963, the assessee-company passed a resolution to transfer the possession of the said land to the 4 (four) surviving members of the joint family namely Smt. Amrit Kaur (widow), Smt. Ikbal Kaur, Smt. Gurbachan Kaur and Sri T.N. Singh, by treating them as tenants under the assessee-company on nominal rental of Rs. 4,000 per annum and relegating the existing tenants occupying the same property to the position of sub-tenants under the aforesaid members of the joint family who could realise the rent from the sub-tenants. In terms of various resolutions adopted by the assessee-company, Smt. Amrit Kaur on behalf of the assessee-company executed a deed of release on 3-10-1966 in favour of the HUF. The terms of the deed of release are in the following words :

1. "...That the company having admitted and accepted the claim of the joint family in its general meeting held on 24-3-1964 to the effect that the transfer made in its favour by Late M. Lal Singh on 2-3-1960 in respect of the properties described in the schedule below was illegal and void and the right, title and interest of the joint family in the said property has subsisted therein all along without any interruption, it (the company) had delivered possession of the said scheduled properties to the joint family on 1-4-1964.

2. That pursuant to the aforesaid mutual agreement the claim of the joining family for compensation for unlawful use and occupation of the said properties by the company and from 2-8-1959 to 31-3-1964 has been fully settled by adjustment against the cost incurred by the company in making the constructions/addition/alteration. In the building described 'Lal Singh Mansion' in the schedule below and the difference therein having been duly settled to the mutual satisfaction of the parties.

3. That in consideration of the mutual agreement and settlement of claim to mutual satisfaction of the parties to these presents as set forth above, the abovenamed company. The Lalsingh Estate (P.) Ltd. of Gauhati do hereby release and relinquishes whatever right, title and interest it had in the property described in the schedule below and also hereby affirms and declares that the said company shall not have any claim, right, title and interest in the said property and in case any claim of any kind at any time made by the company or its heirs/successors/assignees, the same shall be treated as void and would be liable to be annulled on the strength of their deed."

The assessment years are of 1962-63 to 1969-70. The Assessing Officer (ITO) held that M.L. Singh was the absolute owner of the land and it was validly transferred by him to the assessee-company and, therefore, the land and building standing thereon belonged to the assessee-company despite the so-called release deed. The AAC, on appeals, confirmed the orders of all assessment years. There were appeals by the assessee-company before the Tribunal. The Tribunal observed that M.L. Singh was the absolute owner of the land and building in, not the HUF; that the transfer of property made by M.L. Singh to the assessee-company could not be challenged; that there was no evidence that the joint family did not all exist; that joint family had no *locus standi* to question the transfer; and that the release deed was without any lawful authority as the joint family did not own the property. Thereafter, the Tribunal held that the release deed was neither based on fact nor on law and, therefore, it was merely a vehicle of tax evasion and instrument to circumvent tax obligations.

The question which arises for consideration is whether the deed of release in question was not lawful in the sense that it was used for tax evasion or to circumvent tax obligations.

In *CIT vs. B.M. Kharwar* (1969) 72 ITR 603, the Supreme Court has held that the taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship. But the legal effect of a transaction cannot be displaced by probing into the 'substance of the transaction'. In *CIT vs. Meenakshi Mills Ltd.* (1967) 63 ITR 609, the Supreme Court has held that the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation. In *Juggilal Kamalapat vs. CIT* (1969) 73 ITR 702, the Supreme Court reiterated that the Court had power to disregard the corporate entity if it was used for tax evasion or to circumvent tax obligations or to perpetrate fraud, and that the income-tax authorities were entitled to pierce the veil of corporate personality and look at the reality of the transaction.

The ratio of the decisions of the Supreme Court in the above cited cases is that the Court, or the income-tax authority, has the power to lift the veil and examine the nature of transaction if it is used for tax evasion or to circumvent tax obligations and the court has power to reject such a transaction for the purpose of taxing statutes.

Coming to the case on hand, considering the terms of reference we proceed with the case assuming that M.L. Singh was the karta of HUF. The transfer of the properties by M.L. Singh to the assessee-company was for consideration of Rs. 1,10,000. The price of the properties was paid to M.L. Singh partly in cash and partly in the form of shares, as already stated. The affidavit indicates that pattas of the land were in the name of M.L. Singh, not in the name of HUF. He had not stated in the affidavit that the land and building standing thereon were joint family properties. In the plaint of Title Suit No. 84 of 1950 filed by M.L. Singh, he stated that he was the owner of the land under Dag No. 1342 of periodic patta No. 201. Since the land and the structures standing thereon were in the name of M.L. Singh, it shall be presumed that they were individual properties of M.L. Singh. It is true that from the juristic point of view a company registered under the Indian Companies Act and the HUF are separate legal personalities or entities, that is to say, a company is entirely distinct from HUF. In the present case, the shareholders of the assessee-company and the members of the HUF were/are the same persons. During the lifetime of M.L. Singh, the profits or benefits from the properties were enjoyed by the company or the five members of the joint family as shareholders of the assessee-company, for more than 2 years by making additional constructions and also alteration of the then existing building. But on the objection of Smt. Amrit Kaur that the properties in question were the joint family properties and the sale was invalid, the assessee-company took decision to transfer the possession of the properties by treating the surviving members of the HUF as tenants under the assessee-company. If the surviving members of the HUF were treated as tenants under the assessee-company in respect of properties in question, how any of the members of the HUF could assert title against the assessee-company. That apart, if the sale of the properties by M.L. Singh to the assessee-company was nullified by the assessee-company at the instance of Amrit Kaur, M.L. Singh or his heirs are to pay back the money received by M.L. Singh, as the price of the properties, to the assessee-company. There is no material to show such re-payment to the assessee-company. Therefore, the decision of the assessee-company to transfer the possession of the properties was for the purpose of securing some other advantage, say, evasion of tax. It is settled that law does not permit a person to approbate and reprobate. No party can accept and reject the same instrument, that is to say, a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and

say it is void for the purpose of securing some other advantage (see *R.N. Gosain vs. Yashpal Dhir* AIR 1993 SC 352). This being the situation, any of the members of the HUF could not invalidate the sale of the properties by M.L. Singh.

Proceeding further, there is no bar to conveying or transferring the land to HUF by the assessee-company in the circumstances of the case. The question which, therefore, arises for consideration is whether the deed of release executed by Smt. Amrit Kaur will operate as conveyance. In *Thayyil Mammo vs. Kottiath Ramunni* AIR 1966 SC 337, the Supreme Court has held that a registered instrument styled as release deed releasing the right, title and interest of the executant in any property in favour of the release for valuable consideration, may operate as a conveyance, if it clearly discloses an intention to effect a transfer. In *Kuppuswami Chettiar vs. S.P.A. Arumugam Chettiar* AIR 1967 SC 1395, the Supreme Court has held that a release can be usefully employed as form of conveyance by person having some right or interest, to another having a limited estate and release then operates as enlargement of limited estate; and a deed called a deed of release also can, by using words of sufficient amplitude, transfer title to one having no title before transfer.

In view of the above decisions of the Supreme Court, it follows that a deed of release or instrument styled as release deed, in a given case, may operate as a conveyance if it clearly discloses an intention to effect a transfer for valuable consideration. Therefore, the deed of release in question should be for valuable consideration in order that it may operate as a conveyance. The release deed does not indicate the consideration amount. It does not mention how Rs. 1,10,000 was repaid by the HUF to the assessee-company. Clause (2) of the deed indicates only the mutual agreement and settlement of claim of the HUF for the alleged unlawful use and occupation. Therefore, the deed of release does not show consideration. For these reasons, the deed of release does not operate as transfer or conveyance.

On the facts and in the circumstances of the case, the deed of release was not lawful for the purpose of taxing statute. In that view of the matter, the question referred to is answered in the affirmative, that is in favour of the revenue.

(1995) 126 Taxation 92 (Del.)

IN THE HIGH COURT OF DELHI

(Before Hon'ble Justice Mr. D.P. Wadhwa &
Hon'ble Justice Mr. D.K. Jain)

IT Reference No. 8 of 1983

Ram Chander Aggarwal

vs.

Commissioner of Income-tax

For the Appellant	:	**Anoop Sharma, R.K. Raghavan and Deepak Chopra**
For the Respondent	:	**Rajendra and D.N. Malhotra**
Decided on	:	18-7-1994

CAPITAL GAINS — Partner contributing plot of land as his contribution of capital in partnership firm — Revenue treating the same as transfer liable to capital gains —Held, contribution of plot of land by partner a transfer — Transfer not chargeable to capital gains.

Income-tax Act, 1961 — Sections 2(47) & 45.

FACTS & DECISION

During the course of assessment proceedings for the A.Y. 1974-75 the ITO noticed that in his return of income the assessee had claimed that the surplus generated on account of contribution of his land to the firm Nirmal Construction & Finance Company as its partner, was not taxable in his hands as no transfer or sale of the land had taken place. The ITO traced out the history of various transactions involving the land and came to the conclusion that the assessee had created a legal facade by reconstituting the said firm in admitting his second son as partner and showing as contribution by the partners three plots of land as capital at highly inflated price with the clear intention to evade huge tax liability resulting from the said land transactions. He treated the difference between the purchase price and the enhanced value at which the land was transferred to the said firm as the assessee's business profit from an adventure in the nature of trade. In the alternative, he also held that it was a clear case of 'transfer' of land by the assessee within the meaning of section 2(47) of the Act to the said firm and as such the assessee was liable to short term capital gains. The assessee carried the matter further in appeal to the Tribunal but the revenue, it seems, kept quiet. The Tribunal dealt with only the legal proposition of law, viz. whether the transaction in question amounted to a 'transfer' within the meaning of section 2(47), resulting in capital gains chargeable to tax.

The Hon'ble Court held that the Tribunal was right in holding that the handing over of the capital asset to the firm by the assessee did amount to 'transfer' but no capital gains chargeable to tax accrued to the assessee.

Cases referred to :

1. *Sunil Siddharthbhai vs. CIT* (1985) Taxation 79 (3) 187 (SC); (1985) 156 ITR 509 (SC)
2. *G. Venkataswami Naidu & Co. vs. CIT* (1959) 35 ITR 594 (SC)
3. *Khan Bahadur Ahmed Alladin & Sons vs. CIT* (1968) 68 ITR 573 (SC)
4. *CIT vs. Hind Construction Ltd.* (1972) 83 ITR 211 (SC)
5. *CIT vs. Kartikey vs. Sarabhai* (1981) Taxation 63(1) 4 (Guj.); (1981) 131 ITR 42 (Guj.)
6. *Ved Parkash Aggarwal vs. CIT* (1989) Taxation 95 (3) 209 (P&H); (1989) 179 ITR 378 (P&H)

Full text of the Judgment is given below :

JUDGMENT

(D.K. Jain, J.)

The following question has been referred to this Court for opinion, at the instance of the assessee, under section 256(1) of the Income-tax Act, 1961 ('the Act') :

> "Whether the Tribunal was right in law in holding that the transfer of capital asset takes place when the property or asset, belonging to the assessee (partner) is brought in or introduced by the partner into a firm?"

It may be stated that keeping in view the factual background of the case, the question referred does not clearly bring out the controversy and, therefore, requires to be reframed as under :

> "Whether the Tribunal was right in law in holding that contribution in the form of plot of land by the assessee to the partnership firm amounted to a transfer within the meaning of section 2(47) of the Act, resulting in capital gains chargeable to tax ?"

At the outset, Mr. Anoop Sharma, the learned counsel for the assessee, pointed out that answer to the question stands concluded by the decision of the Supreme Court in *Sunil Siddharthbhai vs. CIT* (1985) 156 ITR 509. Mr. Rajendra, the learned standing counsel for the revenue, though candidly admitted that it was so but strenuously urged before us that in view of certain observations of the Supreme Court in the same decision, we should go into the question whether the contribution of plot of land by the assessee as his capital contribution to the firm was merely a device to convert the said asset into money, which would be available for his benefit without attracting any liability to income-tax on capital gains and for this purpose, he suggested that we should now require the Tribunal to submit a supplementary statement of the case. The observations of the Supreme Court sought to be relied upon are as follows :

"...If the transfer of the personal asset by the assessee to partnership in which he is or becomes a partner is merely a device or ruse for converting the asset into money which would substantially remain available for the benefit without liability to income-tax on a capital gain, it will be open to the income-tax authorities to go behind the transaction and examine whether the transaction of creating the partnership is a genuine or a sham transaction and, even where the partnership is genuine, the transaction of transferring the personal asset to the partnership firm represents a real attempt to contribute to the share capital of the partnership firm for the purpose of carrying on the partnership business or is nothing but a device or ruse to convert the personal asset into money substantially for the benefit of the assessee while evading tax on a capital gain. The Income-tax Officer will be entitled to consider all the relevant indicia in this regard, whether the partnership is formed between the assessee and his wife and children or substantially limited to them whether the personal asset is sold by the partnership firm soon after it is transferred by the assessee to it, whether the partnership firm has no substantial or real business or the record shows that there was no real need for the patnership firm for such capital contribution from the assessee. All these and other pertinent considerations may be taken into regard when the Income-tax Officer enters upon a scrutiny of the transaction, for, in the task of determining whether a transaction is a sham or illusory transaction or a device or ruse, he is entitled to penetrate the veil covering it and ascertain the truth." (p. 523)

There can be little dispute that the jurisdiction of this High Court under section 256 is not in the nature of an appellate or revisional supervisory jurisdiction but is purely advisory. It has only to spell out its opinion on legal aspects on the facts as found by the Tribunal. Therefore, the advisory jurisdiction can be exercised only in respect of the question for which advice has been sought by the Tribunal. However, on a particular question of law referred by the Tribunal for its opinion, it is open to the High Court to consider another aspect of the same question of law and it may even re-frame or amplify the question in order to bring out the real controversy between the parties but at the same time in these proceedings it cannot address itself to an entirely new controversy which had neither been raised before the Tribunal nor considered by it nor was it raised on an application under section 256(1). The question which can be answered must be the question which was raised before the Tribunal and was decided by it. It must not be an entirely different question which the Tribunal never considered. This is the legal position settled by a catena of decisions of the Supreme Court. Conscious of this legal position, Mr. Rajendra has not pleaded for re-framing or modification of the question but urges to obtain a supplementary statement so as to bring out the other aspect of the controversy now raised by him, viz, whether the transaction of contribution to land as

capital is a genuine contribution to a real partnership or merely a ruse to avoid capital gains.

The question which arises for consideration is whether the issue now raised by the standing counsel for the revenue could be considered as another aspect of the question referred to us, entitling us to go into it. For it, it would be necessary to travel beyond the statement of the case drawn by the Tribunal (not a normal practice) and bring out some material facts from the annexures forming part of the statement of the case not included therein.

During the course of assessment proceedings for the assessment year 1974-75 the ITO noticed that in his return of income the assessee had claimed that the surplus generated on account of contribution of his land to the firm Nirmal Construction & Finance Company as its partner, was not taxable in his hands as no transfer or sale of the land had taken place. The ITO traced out the history of various transactions involving the land and came to the conclusion that the assessee had created a legal facade by reconstituting the said firm in admitting his second son as partner and showing as contribution by the partners three plots of land as capital at highly inflated price with the clear intention to evade huge tax liability resulting from the said land transactions. Relying on two decisions of the Supreme Court in *G. Venkataswami Naidu & Co. vs. CIT* (1959) 35 ITR 594 and *Khan Bahadur Ahmed & Sons vs. CIT* (1968) 68 ITR 573, he treated the difference between the purchase price and the enhanced value at which the land was transferred to the said firm as the assessee's business profit from an adventure in the nature of trade. In the alternative, he also held that it was a clear case of 'transfer' of land by the assessee within the meaning of section 2(47) of the Act to the said firm and as such the assessee was liable to short-term capital gains. Accordingly while framing assessment, he made an addition on account of short-term capital gains in respect of the land in question. In the first appeal preferred by the assessee, the Commissioner (Appeals) went deeply into the question as to whether the transaction was a transfer within the meaning of section 2(47) and concurred with the ITO in taxing short-term capital gains in the hands of the assessee. The Commissioner (Appeals), however, did not go into the question as to whether the entire exercise by the assessee was a facade created for evading tax. Relying on the decision of the Supreme Court in *CIT vs. Hind Construction Ltd.* (1972) 82 ITR 211, he disagreed with the ITO that the resultant surplus could be treated as assessee's profit from business. The assessee carried the matter further in appeal to the Tribunal but the revenue, it seems, kept quiet. The Tribunal merely relied on a decision of the Gujarat High Court in *CIT vs. Kartikey vs. Sarabhai* (1981) 131 ITR 42 and dismissed the assessee's appeal.

From the above brief narration of facts, it is evident that the Tribunal dealt with only the legal proposition of law, viz, whether the transaction in question amounted to a 'transfer' within the meaning of section 2(47), resulting in

capital gains chargeable to tax. The point now raised before us by the learned counsel for the revenue was not set up before the Tribunal or dealt with by it, nor was any such question sought to be referred on the basis of which this alternative submission could be made. It cannot be permitted to be urged in these proceedings.

It cannot, therefore, be said to arise out of the order of the Tribunal. In that view of the matter, there is no ground for us to call upon the Tribunal to submit a supplementary statement of the case, as pleaded by the learned counsel for the revenue.

Accordingly we decline to reopen the issue, now raised, at this stage, and shall confine ourselves to the consideration of the abovementioned question, which has been referred to us at the instance of the assessee. Having reached this conclusion, in view of the authoritative pronouncement of the Supreme Court in *Sunil Siddharthbhai's* case (supra), wherein the decision of the Gujarat High Court in *Kartikey vs. Sarabhai's* case (supra), relied upon by the Tribunal, has been partly reversed, answer to the reframed question has to be that the Tribunal was right in holding that the handing over of the capital asset to the firm by the assessee did amount to 'transfer' but no capital gains chargeable to tax accrued to the assessee.

The reference is accordingly answered: Before parting we may also note that under identical circumstances, similar view has been expressed by the Punjab & Haryana High Court in the case of another partner of the same firm, since reported as *Ved Parkash Aggarwal vs. CIT* (1989) 179 ITR 378.

There will, however, be no order as to costs.

(1995) 126 Taxation 96 (Pat.)

IN THE HIGH COURT OF PATNA

(Before Hon'ble Justice Mr. G.C. Bharuka &
Hon'ble Justice Mr. Aftab Alam)

Taxation Case No. 44 of 1980

Commissioner of Income-tax

vs.

Bihar Alloy Steels Ltd.

For the Applicant : **K.K. Vidyarthi & S.K. Shyaran**

For the Respondent : **Pawan Kumar, Laxmi Kant Tiwary, Raj Kishore Prasad and Chiranjiv Ranjan**

Decided on : 21-7-1993

TAXABILITY OF INCOME — Share application money deposited with banks during construction — Assessee claiming interest accrued on deposits not taxable and to be adjusted towards cost

of construction — Alternatively, assessee claiming money also borrowed for construction and interest paid thereon to be adjusted against interest received from banks — Claim of the assessee allowed by the Tribunal based on principles of accountancy and commercial practice — Held, interest earned from banks to be assessed as income from other sources — Interest accrued/received not to be adjusted either against capital cost of the project or against interest said on borrowings for construction.

Income-tax Act, 1961 — Sections 4, 56 & 57(iii).

FACTS

The assessee is a limited company. It was incorporated on 17th September, 1965, inter alia, to carry on business of iron founders. In May 1971, the company offered its shares for subscription by the public, which were heavily subscribed. The money so received was much in excess of the assessee's immediate business needs. Accordingly, the surplus money was deposited with the banks on short-term deposits whereby Rs. 3,08,478 was received as interest. In addition to this, the assessee also deposited money with the supplier of steel and these deposits earned interest of Rs. 9,536/-. Thus, the aggregate of interest by the assessee amounted to Rs. 3,18,014/-. The aforesaid interest was adjusted by the assessee against the expenditure on capital work-in-progress. Before completion of the assessment on 14-2-1973, the assessee filed a revised return showing a loss of Rs. 1,70,838/-. This figure was worked out by showing Rs. 3,18,014/- as income and Rs. 4,88,847/- as expenditure. The ITO rejected the plea of expenditure on the ground that the company had not yet commenced the business and that the interest earned is income from 'other sources'. A deduction of Rs. 5,000/- was allowed on ad hoc basis and thus determining the taxable income at Rs. 3,13,014/-. The appeal of the assessee could not succeed and the matter was brought before the Tribunal by way of second appeal. The Tribunal, on appraisal of all the materials before it, recorded a finding of fact that during the period under consideration, the assessee had not commenced any business and it was still in the midst of constructing and completing structures. It also found that the assessee had earned interest to the tune of Rs. 3,18,014/, but it estimated the expenditure essential for earning the said interest income at Rs. 50,000/- against Rs. 5,000/- as assessed by the ITO. The Tribunal further proceeded to record that for the purpose of construction the assessee had also taken a loan against which it paid Rs. 1,09,308/- as interest. The Tribunal found that the interest received by the assessee on short term bank deposits had been appropriated against the cost of construction by debiting the same in 'capital work progress account'. Therefore, keeping in view the provisions of section 4, the charging section of the Act, the Tribunal took the view that the assessee in reality having not earned any income as understood in the

commercial sense, cannot be subjected to income-tax taking into account the interest earned in isolation, without taking into account its application, appropriation and adjustment.

DECISION

The Hon'ble court held that the legal issues involved in the present case have been approached by the Tribunal more through accounting and commercial practice based on practical convenience than by adhering to the legal principles emanating from the provisions of the Act. In the present case, apart from the facts that the assessee had paid certain interest on the borrowings obtained for the purpose of construction, nothing had been found even by the Tribunal that the said amount of interest on borrowing had been paid wholly and exclusively for the purpose of earning the bank interest in question. In fact, the amount on which the bank interest was earned had absolutely no connection with the amount which were borrowed and spent on construction. The matter would have been different if part of the unutilised borrowings would have been temporarily deposited with the bank yielding interest. But that was not the situation here. Therefore, Section 57(iii) of the Act does not permit any deduction as claimed by the assessee, and beyond this provision, there is no other provision under the Act, which enables the assessee to claim any deduction in respect of the bank interest earned by it. There is no provision under the Act providing therein that the income from other sources will be ceased to be taxable if it is applied in acquisition of capital assets. Therefore, merely because the interest income has been appropriated or adjusted towards construction of the plant or building, it does not cease to be an income liable to tax under the Act. It may be true that on balancing of the accounts such interest may be found to be reducing the cost of construction in the sense that it provides additional resources for capital investment but that will be always true if any income earned through any source is applied in construction or acquisition of capital assets. Under the scheme of the Act, application of income *per se* does not affect its taxability except for specific provisions in this regard. So far as this court is concerned, the issue is now no more *res integra* since a similar question has been specifically dealt with by a Bench of this Court in the case of *Bokaro Steel Ltd vs. CIT* (1988) 170 ITR 545 (Pat.). The Hon'ble court after considering various authorities on the issue, answered the question against the assessee by holding that the interest so received constituted the income of the assessee. In the above view of the matter, both the questions referred to the court were answered in negative, i.e.against the assessee and in favour of the department.

Cases referred to :

1. *CIT vs. United Wire Ropes Ltd.* (1980) 121 ITR 762 (Bom.)
2. *Addl. CIT vs. Madras Fertilizers Ltd* (1980) 122 ITR 139 (Mad.)
3. *CIT vs. Bokaro Steel Ltd.* (1988) 170 ITR 522 (Pat.)

4. *Gopal Saran Narayan Singh vs. CIT* (1935) 3 ITR 237 (PC)
5. *Challapalli Sugars Ltd. vs. CIT* (1975) 98 ITR 167 (SC)
6. *CIT vs. Shoorji Vallabhdas & Co.* (1962) 46 ITR 11 (SC)

Full text of the Judgment is given below :

JUDGMENT

(G.C. Bharuka, J.)

In this reference application a statement of case had been called for by this Court under S. 256(2) of the IT Act, 1961 (hereinafter to be referred to as "the Act" only) for examining the following questions of law, which relate to asst. yr. 1972-73 :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in deleting Rs. 3,13,014 for the asst. yr. 1972-73 as income from other sources on account of interest as determined by the ITO and confirmed by the AAC in appeal ?

(2) Whether, in the facts and circumstances of the case, interest earned, taxable as income from the other sources, is subject to deduction towards the construction of the factory ?"

The assessee is a limited company. It was incorporated on 17th Sept., 1965, *inter alia*, to carry on business of iron founders. In May 1971, the company offered its shares for subscription by the public, which were heavily subscribed. The money so received was much in excess of the assessee's immediate business needs. Accordingly the surplus money was deposited with the banks on short-term deposits whereby Rs. 3,08,478 was received as interest. In addition to this, the assessee also deposited money with the supplier of steel and these deposits earned interest of Rs. 9,536. Thus, the aggregate of interest earned by the assessee amounted to Rs. 3,18,014.

As required under the provisions of the Act, the assessee filed its return on 9th Oct., 1972 declaring its income as nil for the assessment year in question. During the course of assessment it transpired that the aforesaid interest has been adjusted by the assessee against the expenditure on capital work-in-progress. Before completion of the assessment, on 14th Feb., 1973 the assessee filed a revised return showing a loss of Rs. 1,70,838. This figure was worked out by showing Rs. 3,18,014 as income and Rs. 4,88,847 as expenditure. The ITO rejected the plea of expenditure on the ground that the company had not yet commenced the business and that the interest earned is income from "other sources". But he allowed a deduction of Rs. 5,000 on ad hoc basis and thus determining the taxable income at Rs. 3,13,014 . The appeal to the AAC could not succeed. Thus the matter was brought before the Tribunal by way of second appeal.

The Tribunal on appraisal of all the materials before it recorded a finding

of fact that during the period under consideration, the assessee had not commenced any business and it was still in the midst of constructing and completing structures. It also found that the assessee had earned interest to the tune of Rs. 3,18,014, but it estimated the expenditure essential for earning the said interest at Rs. 50,000 against Rs. 5,000 as assessed by the ITO. The Tribunal further proceeded to record that for the purpose of construction the assessee had also taken a loan against which it paid Rs. 1,09,308 as interest. The Tribunal found that the interest received by the assessee on short-term bank deposits has been appropriated against the cost of construction by debiting the same in "Capital work progress account". Therefore, keeping in view the provisions of S. 4, the charging section of the Act, the Tribunal took the view that the assessee in reality having not earned any income as understood in the commercial sense, cannot be subjected to income-tax taking into account the interest earned in isolation, without taking into account its application, appropriation and adjustment.

Shri Vidyarthi, learned standing counsel appearing for the Department, has submitted that the Tribunal has erred in holding that the amount of interest received on deposits with the bank is not liable to income-tax under the Act because taxability of a receipt under the Act is not dependent on its subsequent application. His further submission was that under S. 57(iii) of the Act, deduction from income chargeable under the head "Income from other sources" can be made only in respect of such expenditure, which are not capital in nature and have been laid out or expended wholly and exclusively for the purpose of making or earning much income, which is not the situation here. In support of his submissions, he has placed reliance on the decision in the case of *CIT vs. United Wire Ropes Ltd.* (1980) 121 ITR 762 (Bom.) and *Addl. CIT vs. Madras Fertilisers Ltd.* (1980) 122 ITR 139 (Mad.).

Shri Pawan Kumar, learned counsel appearing for the assessee, has strenuously argued that the view taken by the Tribunal is in conformity with the decision of this Court in the case of *CIT vs. Bokaro Steel Ltd.* (1988) 170 ITR 522 (Pat.) and, as such, the same should be affirmed. According to him, in the case like the present one, the Brochure (study on expenditure during construction period) issued by the Institute of Chartered Accountants of India and published in December, 1970, should be accepted as laying down the guiding principle which, while dealing with the "Income during construction or production period" had said that "Similarly interest income earned during construction period may be set off against interest expenses incurred during the period".

After hearing the learned counsels for parties and perusing the order of the Tribunal, I am of the opinion that the legal issues involved in the present case have been approached by the Tribunal more through accounting and commercial practice based on practical convenience than by adhering to

the legal principles emanating from the provisions of the Act. The discussions made hereunder will duly substantiate it.

It is an admitted position that, during the period under consideration, the company had not commenced its business and its plants and buildings were under construction. It is also not in dispute that it had earned Rs. 3,18,014 by way of interest from the bank deposits and had been debited in "capital work progress account". The order of the Tribunal also shows that the assessee had paid Rs. 1,09,308 as interest on borrowings obtained for the purpose of construction. Keeping in view these foundational facts, the various facets of the questions which fall for our consideration are (i) whether the interest received by the assessee from the bank can be at all termed as income under the Act, (ii) if it is an income whether any deduction is allowable therefrom, and (iii) whether the said interest income is at all taxable since its application had reduced the cost of construction or that it was utilised for the purpose of construction.

Sec. 4 of the Act is the charging section and sub-s. (1) thereof reads as under :

> "Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax on that rate or rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of total income of the previous year or years as the case may be of every person.
>
> Provided that where by virtue of any provision of the Act income-tax is to be charged in respect of the income of a period other than the previous year, the income-tax shall be charged accordingly."

Therefore, tax under the Act is leviable on the total income of the previous year to be computed in accordance with the provisions of the Act.

The inclusive definition of "income" as set out under s. 2(24) of the Act takes within its sweep various profits and receipts. In the case of *Gopal Saran Narayan Singh vs. CIT* (1935) 3 ITR 237 (PC) at page 242, it has been held by the Privy Council that, "anything which can properly be described as income is taxable under the Act unless expressly exempted". Keeping in view the facts and the meaning of 'income' as discussed above needs no further elaboration to hold that the bank interest received in this case is an "income from other source" within the meaning of s. 56 of the Act since income is not chargeable under any other head of income specified in s. 14 of the Act. If that be so, the assessee will be entitled to deduction from this income only if the conditions laid down under s. 57(iii) of the Act are satisfied which reads as under :

> "57. The income chargeable under the head "income from other sources" shall be computed after making the following deductions, namely,

(iii) any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income".

The language of the aforementioned section is clear, explicit and clinches the issue involved.

On a reading of s. 4 with s. 57(iii) of the Act, there is no escape from taking the view that expenditure is allowable as deduction out of an "income from other sources" only if it is found that, in fact (i) it has been expended wholly and exclusively for the purpose of making or earning such income and (ii) it is not in the nature of capital expenditure.

In the present case, apart from the facts that the assessee has paid certain interest on the borrowings obtained for the purpose of construction, nothing has been found even by the Tribunal that the said amount of interest on borrowing have been paid wholly and exclusively for the purpose of earning the bank interest in question. In fact, the amount on which the bank interest was earned has absolutely no connection with the amount which were borrowed and spent on construction. The matter would have been different if part of the unutilised borrowings would have been temporarily deposited with the bank yielding interest. But that is not the situation here. Therefore s. 57(iii) of the Act does not permit any deduction as claimed by the assessee, and beyond this provision, there is no other provision under the Act, which enables the assessee to claim any deduction in respect of the bank interest earned by it.

Coming to the next facet of the question, it is to be seen whether application of the interest income or its mode of accounting can make it exempted. In my opinion, seeking of answer to the question does not pose any difficulty. There is no provision under the Act providing therein that the income from other sources will be ceased to be taxable if it is applied in acquisition of capital assets. Therefore, merely because the interest income has been appropriated or adjusted towards construction of the plant or building, it does cease to be an income liable to tax under the Act. It may be true that on balancing of the accounts such interest may be found to be reducing the cost of construction in the sense that it provides additional resources for capital investment but that will be always true if any income earned through any source is applied in construction or acquisition of capital assets.

Under the scheme of the Act, application of income *per se* does not effect its taxability except for specific provisions in this regard. Incidentally, I may also notice here that in view of the law laid down by the Supreme Court in the case of *Challapalli Sugars Ltd. vs. CIT* (1975) 98 ITR 167 (SC), interest paid on amounts borrowed by the assessee for acqusition and installation of plant and machineries, before commencement of production form part of the "actual cost" of the asset to the assessee" and, as such it is capital expenditure. Accordingly interest paid by the assessee in the

present case being capital in nature cannot be allowed as deduction in computing the income of the assessee.

The submissions of Mr. Pawan Kumar that since the brochure of the Institute of Chartered Accountants, referred to above, provides that the interest income earned during the construction period may be set off against expenses incurred during the said period, therefore, the same principle should be applied for computing the taxable income, needs to be considerec now. By referring to *Challapalli Sugars Ltd.* case (supra), he has submittec that even the Supreme Court has taken aid from the guidelines laid down in the said brochure for ascertaining the true import and meaning of the words "actual cost" for the purpose of s. 10 of the Indian IT Act, 1922. In my opinion, this submission has got to be rejected for two reasons. Firstly the Supreme Court in the case of *Challapalli Sugars Ltd.* (supra) has taken aid from the various expert reports and opinion to ascertain the meanin of the words 'actual cost', since the said phrase has not been defined unde the Act. According to their Lordships (keeping in view the settled cannons of interpretation), the words required to be "construed in the sense which no commercial man would misunderstand". This is not the situation here. No statutory expression as such has fallen for our consideration which necessitated the application of the said principle. Moreover, the principle of commercial accounting cannot determine or affect the range of taxable income or ambit of taxation because the tax liability under the Act is tc be governed by the provisions of the Act and not by the principle lai down for maintaining the accounts even by an expert body or actual metho of maintaining the account.

In the case of *CIT vs. Shoorji Vallabhdas & Co.* (1962) 46 ITR 144 (SC it has been held by the Supreme Court, that—

> "Income-tax is a levy on income, though the IT Act takes into accoun two points of time at which the liability to tax is attracted, viz., th accrual of the income or its receipt, yet the substance of the matte is the income. If income does not result at all, there cannot be a tax even though in book-keeping, an entry is made about a "hypothetica income" which does not materialise. Where income has, in fact, bee received and is subsequently given up in such circumstances that remains the income of the recipient, even though given up, the ta may be payable. Where, however, the income can be said not to hav resulted at all, there is obviously neither accrual nor receipt of income even though an entry to that effect might, in certain circumstances have been made in the books of account."

In the above view of the matter, the brochure of the Institute of Charter Accoutants, referred to above, is of no avail to the assessee.

In the present case, it is not necessary to individually deal with all th decisions cited at the Bar because in my opinion so far as this Court

decisions cited at the Bar because in my opinion so far as this Court is concerned, the issue is now no more *res integra* since a similar question has been specifically dealt with by a Bench of this Court in the case of *Bokaro Steel Ltd. vs. CIT* (1988) 170 ITR 545 (Pat.). In this case the assessee had received sums from the Government for the construction of its plant. The unutilised part of sums so received used to be deposited in the bank on short-term deposit and earned interest thereon. On this fact, the question which had fallen for consideration before this Court was as to whether the interest so received was liable to be assessed as income of the assessee or such interest should reduce the cost of construction of the assessee and, therefore, would not constitute its income. This is question No. 4 at page 547 of the said report. This Court, after considering various authorities on the issue, answered the question against the assessee by holding that the interest so received constitutes the income of the assessee.

In the above view of the matter, both the questions referred to us are answered in negative, i.e., against the assessee and in favour of the Department. Anyhow there will be no order as to costs.

Aftab Alam, J. — I agree.

(1995) 126 Taxation 104 (Gau.)

IN THE HIGH COURT OF GAUHATI

(Before Hon'ble Mr. Justice Manisana & Hon'ble Mr. Justice S.B. Roy)

IT Reference No. 4 of 1987

Commissioner of Income-tax

vs.

Sarda Trading Corporation

For the Appellant	:	**D.K. Talukdar and B.J. Talukdar**
For the Respondent	:	**None**
Decided on	:	30.3.1993

CAPITAL GAIN — Assessee claiming while computing income under head capital gain deduction u/s 80T be allowed first and thereafter deduction to be allowed u/s 54E — Held, deduction u/s 54E to be allowed first and thereafter deduction u/s 80T. Income-tax Act, 1961 — Sections 48, 54E & 80T.

FACTS

The assessee is a registered firm. The A.Y. involved is 1979-80. During the previous year, the assessee sold a flat at Bombay. The assessing authority after deducting the written down value and sale expenses from the net consideration, decided u/s 54E of the Act as to what extent capital gain on the transfer of the capital asset shall not be chargeable to

income-tax in respect of the sum of Rs. 75,000/- which formed part of sale proceeds and deposited with the United Commercial Bank at Dibrugarh in fixed deposit. Thereafter, the assessing authority made a deduction allowable u/s 80T of the Act from the income chargeable in computing the total income of the assessee under the head 'Capital Gains'. On appeal by the assessee, the AAC set aside the manner of calculation made by the assessing authority by holding that 'section 80T deduction would be allowed on the capital gains before the exemption u/s 54E is allowed'. The Tribunal confirmed the findings of the AAC.

DECISION

If section 54E is applied, the whole or any part of the capital gain would not be chargeable to income-tax. Under section 80T, where the gross total income of an assessee not being a company includes any income chargeable under the head 'capital gains' relating to long term capital asset, there shall be allowed, in computing the total income of the assessee, a deduction from such income as is provided thereunder. This being the position, for the application of section 80T, there must be an income chargeable under he head 'capital gains' relating to long term capital asset. It there is no such income, section 80T is not attracted. Section 54E shall be allowed first, and thereafter section 80T may or may not be applicable depending upon the quantum of exemption u/s 54E. Under there circumstances, the question was answered in the negative i.e. in favour of the revenue and against the assessee.

Full text of the Judgment is given below :

JUDGMENT

(Manisana, J.)

At the instance of the Commissioner, the following question of law has been referred to this Court under section 256(1) of the Income-tax Act, 1961 ('the Act'):

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that for computation of income under the head 'Capital gains' deduction under section 80T of the Income-tax Act, 1961, is to be given below giving deduction under section 54E of the Act ?"

The assessee is a registered firm. The A.Y. involved is 1979-80. During the previous year, the assessee sold a flat at Bombay. The assessing authority ('the ITO'), after deducting the written down value and sale expenses from the net consideration, decided u/s 54E of the Act as to what extent capital gain on the transfer of the capital asset shall not be chargeable to income-tax in respect of the sum of Rs. 75,000/- which formed part of sale proceeds and deposited with the United Commercial Bank at Dibrugarh in fixed deposit. Thereafter, the assessing authority made a deduction allowable u/s 80T of the Act from the income chargeable in computing the total

income of the assessee under the head 'Capital Gains'. On appeal by the assessee, the AAC set aside the manner of calculation made by the assessing authority by holding that 'section 80T deduction would be allowed on the capital gains before the exemption u/s 54E is allowed'. The Tribunal confirmed the findings of the AAC.

Section 45 of the Act, as it stood in the relevant year, provides that save as otherwise provided in sections 53, 54, 54B, 54D and 54E of the Act, any profits or gains arising from the transfer of a capital asset effected in the previous year shall be deemed to be the income of the previous year in which the transfer took place and shall be chargeable to income-tax under the head 'Capital gains'.

Under section 54E, where the capital gain arises from the transfer of a long-term capital asset and the assessee has, within a period of six months after the date of such transfer, invested or deposited the whole or part of the net consideration in any specified asset, the whole of such capital gain, or a part of it, shall not be charged under section 45 of the Act. Therefore, if section 54E is applied the whole or any part of capital gain would not be chargeable to income-tax.

Under section 80T, where the gross total income of an assessee not being a company includes any income chargeable under the head 'capital gains' relating to long term capital asset, there shall be allowed, in computing the total income of the assessee, a deduction from such income as is provided thereunder. This being the position, for the application of section 80T, there must be an income chargeable under he head 'capital gains' relating to long term capital asset. If there is no such income, section 80T is not attracted.

What emerges from a reading of sections 45, 54E and 80T of the Act is this. Any profits or gains of transfer of a long term capital asset in the previous year shall be deemed to be income of the previous year and shall be chargeable to income-tax under the head 'Capital gains'. But the whole or any part of the capital gain to which the provisions of section 54E apply would not be chargeable to income-tax. In other words, if section 54E is attracted, such income shall be 'tax exempt income'. Therefore, the assessing authority is to decide under section 54E as to whether the whole or any part of the capital gain on the transfer of a long-term capital asset shall be exempt from taxation. If the whole of such income is not exempt, the assessing authority shall determine the income chargeable under the head 'Capital gains', and, thereafter, there shall be deduction as provided under section 80T, that is to say, if there is no such income chargeable to tax after exemption under section 54E, the application of section 80T does not arise.

For the reasons stated above, section 54E shall be allowed first, and thereafter section 80T may or may not be applicable depending upon the quantum of exemption u/s 54E. Under these circumstances, the question

is answered in the negative i.e. in favour of the revenue and against th assessee.

Reference is disposed of accordingly. No costs.

(1995) 126 Taxation 107 (Guj.)

IN THE HIGH COURT OF GUJARAT

(Before Hon'ble Mr. Justice G.T. Nanavati & Hon'ble Mr. Justice S.M. Soni)

IT Reference No. 271 of 1980

Nandlal Kanaiyalal

vs.

Commissioner of Income-tax

For the Appellant : **D.A. Mehta, R.K. Patel and K.C. Patel**
For the Respondent : **M.J. Thakore**
Decided on : 30.3.1993

PENALTY FOR CONCEALMENT — Assessee filing original return — Raid conducted by revenue on business and residential premises of assessee's father — Notice issued u/s 143(2) — Assessee filin revised return declaring income of Rs. 26,611 against income o Rs. 10,951 disclosed in the original return — Addition o Rs. 2,000/- made — Notice for concealment issued — Assessee pleading in view of revised return, penalty not to be levied — Held, revised return filed after concealment detected — Revisec return not treated as voluntary return — Penalty rightly levied. Income-tax Act, 1961 — Section 271C.

FACTS

For the A.Y. 1967-68, the assessee filed his return of income or 23.12.1968. The income disclosed was Rs. 10,951/-. Department hac carried out a raid at the place of the father of the assessee and seize certain documents. On 18.5.1971, a notice was given to the assessee u/s 143(2) of the Act. Thereafter, i.e. on 21.7.1971, the assessee file a revised return of his income disclosing that his income was Rs. 26,611 The ITO made maximum addition of Rs. 2,000/- and determined th income of the assessee at Rs. 28,611/-. Notice was issued to the assessee u/s 274 for penalty u/s 271(1)(c). The ITO also held that Explanatior to section 271(1) was also attracted and that the assessee failed tc discharge the burden which arose as a result of deeming fiction createc by the Explanation. This order of penalty was challenged by the assessee by filing an appeal before the AAC but without any success. The seconc appeal to the Tribunal also met with the same fate.

DECISION

The Tribunal has recorded a finding that it cannot be said that the revisec

return in such circumstances was filed by the assessee on his own accord and sweet will. Thus, the revised return filed by the assessee has not been treated as a voluntary return. This finding has been recorded after appreciating the relevant circumstances. Therefore, it being a finding of fact, will have to be accepted by this court. There was raid by the Income-tax Department at the business as well as residential premises of the father of the assessee and the assessee himself was given notice u/s 143(2), it cannot be said that the view taken by the Tribunal is unreasonable or that it was not justified in confirming the penalty levied upon the assessee. The assessee having failed to discharge the burden arising as a result of the *Explanation* to section 271(1)(c), the authorities were right in levying penalty upon the assessee and the Tribunal was equally justified in confirming the same.

Full text of the Judgment is given below :

JUDGMENT

(Nanavati, J.)

For the year 1967-68, the assessee filed his return of income on 23.12.1968. The income disclosed was Rs. 10,951. For the subsequent two years, the assessee filed his returns on 10.10.1969 and 30.9.1970. On 23.12.1969, the Income-tax Department had carried out a raid at the place of the father of the assessee and seized certain documents. On 18.5.1971, a notice was given to the assessee u/s 143(2) of the Act. Thereafter, i.e. on 21.7.1971, the assessee filed a revised return of his income disclosing that his income was Rs. 26,611/-. The ITO on verification on the books of account of the assessee found that the assessee had not given details of the amount received as brokerage and, in absence of the vouchers or receipts, the correctness of the amount received was not verifiable. He, therefore, made maximum addition of Rs. 2,000/- and determined the income of the assessee at Rs. 28,611/-. While passing the order of assessment, the ITO also directed that a notice be issued to the assessee under section 274 for penalty under section 271(1)(c) the Act, inasmuch as, the assessee had furnished inaccurate particulars of his income. In the proceedings initiated under section 271 (1)(c) of the ITO held that the assessee's intention at the time of filing the original return was 'not that of innocence' and that the assessee had deliberately understated his income as could be seen from his subsequent admission that his real income was Rs. 26,611. The ITO also held that *Explanation* to section 271(1) was also attracted and that the assessee failed to discharge the burden which arose as a result of deeming fiction created by the *Explanation*. For coming to the conclusion that the original return filed by the assessee was not voluntary and *bona fide*, the ITO relied upon four circumstances: (i) the assessee had filed copy of his capital account along with the return of income for the assessment years 1969-70 and 1970-71 and that would mean that till 30.9.1970, he had not discovered the mistake and that was not believable; (ii) in the previous year, the assessee

had received brokerage of Rs. 7864 only; (iii) the revised return was filed after the raid at the residential as well as business premises of his father on 23.12.1969 and that indicated that it was filed under an apprehension of 'deeper probe in his financial affairs' by the department; and (iv) the assessee had filed the revised return after he had received the notice under section 143(2). The ITO levied maximum penalty of Rs. 31,320. This order of penalty was challenged by the assessee by filing an appeal before the AAC but without any success. The second appeal to the Tribunal also met with the same fate. Thereupon, the assessee moved the Tribunal to refer the following four questions to this Court on the ground that they arose out of the order of the Tribunal:

> "1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in confirming levy of penalty under section 271(1)(c) of the Income-tax Act, 1961 ?
>
> 2. Whether the finding of the Tribunal that the revised return was not voluntary is supported by any evidence or material on record?
>
> 3. If the answer to the second question is in the affirmative, whether, on the facts and circumstances of the case, the Tribunal was justified in concluding that the revenue has discharged burden of proof in the said proceedings ?
>
> 4. Whether the finding of the Tribunal as to confirmation of the penalty is reasonable and arrived at after considering all relevant documents and evidence on the record and the same is sustainable at law ?"

The Tribunal refused to refer question No. 2 on the ground that answer to that question was self-evident. As regards question No. 3, the Tribunal observed that it did not arise from its order. It refused to refer question No. 4 on the ground that its attention was not invited to any documentary evidence on record which was not considered by the Tribunal. Thus, the Tribunal refused to refer question Nos. 2, 3, and 4 to this Court. Question No. 1 was reframed by the Tribunal and it has been referred to this Court. It reads as under:

> "Whether, on the facts and in the circumstances of the case, the order levying the penalty of Rs. 15,660 under section 271(1)(c) of the Act can be sustained ?"

It may be stated that even though the Tribunal refused to refer question Nos. 2 to 4 to this Court, the assessee had not moved this Court under section 256(2) of the Act and, therefore, we are required to answer question No. 1 only, bearing in mind that the Tribunal has refused to refer question Nos. 2 to 4 to this Court. Not only that, but question No. 1, that is, the question referred to us will have to be answered in the context of the findings recorded by the Tribunal and which findings are now no longer open to challenge.

As stated earlier, the Tribunal has recorded a finding that 'it cannot be

said that the revised return in such circumstances was filed by the assessee on his own accord and sweet will. Thus, the revised return filed by the assessee has not been treated as a voluntary return, meaning thereby that it was not a revised return filed *bona fide* on discovery of any mistake. The Tribunal has in terms recorded a finding that there was no scope for any mistake being committed. This finding has been recorded after appreciating the relevant circumstances. Therefore, it being a finding of fact, will have to be accepted by this Court.

For that reason, in order to decide whether *Explanation* to section 271 (1)(c) became applicable or not, we will have to consider the original return. Obviously the difference between income returned and income assesseed was more than 20 per cent and, therefore, it was for the assessee to explain and prove that failure to return correct income did not arise from any fraud or gross or wilful neglect on his part. The only explanation which the assessee gave while submitting his revised return and while replying to the show-cause notice was that it was through mistake that such brokerage commission receipts were left out to be shown in the previous return. How that mistake occurred and how it came to his notice remained unexplained. In fact, no attempt, whatsoever, was made by the assessee to show that it was really a case of mistake which was subsequently noticed by him. In fact, making up of accounts for the subsequent years, including balance sheet, and the corrections which were made with respect to cash on hand are indicative of the fact that this was not a case of mistake but it was a case of deliberate concealment. If this discrepancy in the account is considered along with the fat that there was raid by the Income-tax Department at the business as well as residential premises of the father of the assessee and the assessee himself was given notice u/s 143(2), it cannot be said that the view taken by the Tribunal is unreasonable or that it was not justified in confirming the penalty levied upon the assessee. The assessee having failed to discharge the burden arising as a result of the *Explanation* to section 271(1)(c), the authorities were right in levying penalty upon the assessee and the Tribunal was equally justified in confirming the same.

We, therefore, answer the question in the affirmative, that is, against the assessee and in favour of the revenue. Reference is disposed of accordingly. No order as to costs.

Summary of High Court Cases

(1995) 126 Taxation 111 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Justice Y.R. Meena &
Hon'ble Mr. Justice V.K. Singhal)

D.B.W.T. Reference No. 56 of 1985

Commissioner of Wealth-tax

vs.

Raj Kumari Bhuvaneshwari, Kota

Decided on : 12.1.1995

WEALTH-TAX — Valuation of property — Tribunal holding provision of Rajasthan Urban Property (Restriction on Transfer) Act, 1973 applicable for determining market value — Tribunal restricting the value of the property to a particular figure — Held, restriction only pertains to right of owner to transfer the property — While valuing the property the market value to be diminished in view of hazards placed by the only Act.

Wealth-tax Act, 1957 — Section 7.

FACTS & DECISION

The Tribunal while valuing the property held that since the provisions of Rajasthan Urban Property (Restriction on Transfer) Act 1973 was applicable for determining the market value of the property, the valuation of these properties were restricted to a sum of Rs. 3 lakhs. When the matter was referred to the Hon'ble Court, it was held that this matter was already covered by a judgment of this court in the assessee's case and as was held by the Apex Court in the case of *CWT vs. Raghubar Narain Singh* (1984) 146 ITR 228 that if an asset is subject to certain hazards then that factor which has the effect of determining the market value of the asset is a relevant factor and the market value can only be decreased proportionately and cannot be restricted to a particular figure. The matter was sent back to the Tribunal for redetermining the market value and all other issues raised by the assessee.

(1995) 126 Taxation 112 (Bom.)

IN THE HIGH COURT OF BOMBAY

(Before Hon'ble Justice Dr. B.P. Saraf & Hon'ble Mr. Justice D.R. Dhanuka)

IT Reference No. 236 of 1982

Commissioner of Income-tax

vs.

Chemaux Ltd.

Decided on : 24.9.1993

BUSINESS EXPENDITURE — Assessee incurring expenses on repair of approach road & resurfacing of kachha road inside factory premises — Held, expenses allowable as revenue expenditure.

Income-tax Act, 1961 — Section 37(e) .

FACTS & DECISION

In this case the assessee incurred an expenses of Rs. 29,203/- and Rs. 72,450/- respectively on repair of approach road and resurfacing of the kachha roads inside its factory premises. The expenses were not allowed by the revenue as a revenue expenditure. In this case it was conceded by the counsel of the revenue that in view of the decisions of the Supreme Court and of Bombay High Court, the expenditure was allowable as claimed. The question thus answered against the revenue.

TAX REPORTS

(1995) 126 Taxation 113 (Mad.)

IN THE HIGH COURT OF MADRAS

(Before Hon'ble Mr. Justice Raju)

WP Nos. 1353 & 1354 of 1993

R. Raghavan

vs.

Assistant Commissioner of Income-tax

For the Appellant	:	**Ms. Latha Sakthivelu**
For the Respondent	:	**N.V. Balasubramanian**
Decided on	:	20.7.1994

LEVY OF INTEREST — Interest charged for penalties u/ss 234A, 234B and 234C for late filing of return and non-payment of advance tax — Assessee moving Assessing Officer for waiver of interest — Revenue contending no petition for waiver of interest maintainable — Held, assessee at liberty to move concerned authority and/or C.B.D.T. for appropriate relief.

Income-tax Act, 1961 — Sections 234A, 234B and 234C.

Constitution of India — Article 226.

FACTS & DECISION

The only point involved in these two writs is that the assessment of the petitioner was completed and while completing the assessment, the Assessing Officer charged interest u/ss 234A, 234B and 234C which was introduced w.e.f. A.Y. 1989-90. The assessee applied for waiver/reduction of interest but the petition was dismissed since no petition was provided against levy of interest under these sections. Being aggrieved, the assessee filed the present petitions. The Hon'ble Court held that the petitioner has the liberty to move the concerned ITO/ Assessing Authority and/or C.B.D.T for appropriate relief and for orders depending upon the nature of grievance and the relief that is sought for. The authorities were directed to consider the claim after giving notice and opportunities to the petitioner and, therefore, pass appropriate orders in accordance with the law.

Full text of the Judgment is given below :

JUDGMENT

These two writ petitions are dealt with together since they relate to one and the same subject-matter thought praying for different reliefs.

In W.P. No. 1353 of 1993, the petitioner prays for a writ of certiorarified mandamus to call for the records of the petitioner in PA/GI.PT 9933/SIC II on the file of the first respondent and quash the order dated 23.11.1992

relating to levy of interest under sections 234A to 234C of the Income-tax Act, 1961 ('the Act') and, consequently, direct the first respondent not to charge any interest under sections 234A, 234B and 234C.

In W.P No. 1354 of 1993, the petitioner prays for a writ of declaration declaring that the provisions of sections 234A, 234B and 234C introduced by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1.4.1989 are illegal, unconstitutional, *ultra vires* and unenforceable so far as the petitioner is concerned.

In similar circumstances identical writ petitions filed came up for consideration of this Court and, in and by my order dated 13.12.1993, in W.P. Nos.2528 to 2539, etc., of 1993, I have issued certain directions to authorities for the claim towards interest. While doing so, I have issued directions as hereunder :

"So far as writ petitions filed against the order of the assessing authorities applying the provision of the Act and levying interest are concerned, it is stated by the learned counsel for the petitioners that in one of such cases, on appeal, relief has been obtained by the assessee, though the department has pursued the matter in that case on further appeal. Be that as it may, either in such case or in the other cases filed directly against the Income-tax Officer, the petitioners concerned shall have liberty to move the concerned Income-tax Officer/assessing authority or/and Central Board of Direct Taxes for appropriate relief and orders, depending upon the grievance and relief that is sought for. As and when the petitioners in those writ petitions move the Central Board, the said authority shall consider the claims so made in the light of the directions issued in the other batch of cases referred to above. The assessing authority concerned also shall be at liberty as and when moved by the respective petitioners to consider the claim, if any, that may be made as are permissible in law for such authority to consider and pas appropriate orders in this regard.

So far as W.P. Nos. 2529, 7431, 7433, 7735, 7737, 11240, 18548 &18995 of 1993 challenging the constitutional validity of sections 234A to C of the Act are concerned, the learned counsel, in the light of the order passed as above, has made an endorsement on the case bundle that the petitioners are not pursuing the challenge for the time being in these proceedings and that liability may be given to withdraw such writ petitions. Accepting the request made, the writ petitions filed for writs of declaration challenging the constitutional validity of the provisions of the Act referred to above shall stand hereby dismissed as withdrawn and not pressed. This Court makes it very clear that the dismissal of such writ petitions shall not be construed as an expression of any opinion on the validity of the provisions themselves."

The learned counsels appearing on either side agree that the writ petitions now under consideration may also be disposed of on the same lines as the

other batch of writ petitions referred to supra. Consequently, applying the ratio of the said decision, W.P. No. 1354 of 1993 for a writ of declaration challenging the constitutional validity of the provisions of the Act shall stand dismissed as withdrawn and not pressed in view of the endorsement made in this case also, making it clear that the dismissal of the said writ petition shall not be construed as an expression of any opinion on the validity of the provisions themselves.

So far as W.P. No. 1353 of 1993 is concerned, the petitioner shall have liberty to move the concerned ITO/assessing authority or/and CBDT for appropriate relief and orders depending upon the nature of grievance and the relief that is sought for. As and when the petitioner in the above writ petition moves the CBDT or the authorities concerned, such authority shall consider the claim so made by the petitioner in the light of the directions issued in W.P. Nos. 2528 to 2539, etc., of 1993 dated 13.12.1993, of course, after giving notice and opportunity to the petitioner or his representative to represent his case and pass appropriate orders in accordance with law. This writ petition is finally disposed of on the above terms. No costs.

(1995) 126 Taxation 115 (Guj.)

IN THE HIGH COURT OF GUJARAT

(Before Hon'ble Mr. Justice G.T. Nanavati & Hon'ble Mr. Justice Y.B. Bhatt)

IT Reference No. 139 of 1981

Commissioner of Income-tax

vs.

Maharana Mills Ltd.

For the Appellant	:	**B.J. Shelat and M.R. Bhatt**
For the Respondent	:	**K.H. Kaji**
Decided on	:	18.8.1993

BUSINESS EXPENDITURE — Assessee incurring expenditure on current repairs of guest house — Claim disallowed u/s 37(4) — Held, expenditure allowable u/s 30 — Such expenditure would not fall u/s 37.

Income-tax Act, 1961 — Sections 30, 37(1) and 37(4).

ENTERTAINMENT EXPENDITURE — A.Y. 1976-77 — Assessee claiming expenditure incurred on messing and tea supplied to staff and visitors not to be entertainment expenditure — Held, expenditure not on a lavish scale and allowable and not hit by section 37(2)(b).

Income-tax Act, 1961 — Section 37(2)(b).

FACTS

During the assessment proceedings for the A.Y. 1976-77, the assessee claimed deduction in respect of various items of expenditure. It had claimed deduction of Rs. 36,329/- being the messing expenses and part of tea expenses. They also claimed deduction of Rs. 69,076/- being the expenses incurred on current repairs of the guest house Villa 7 at Porbandar. Both these expenditures were disallowed by the ITO on the ground that the first expenditure being in the nature of entertainment was required to be disallowed u/s 37(2B) of the Act and the other expenditure was not allowable u/s 37(4). The AAC disagreed with this view of the ITO and allowed both the claims. The Tribunal also confirmed the view taken by the AAC.

DECISION

The Hon'ble Court held that the expenditure which is referred to in clause (i) of sub-section (4) of section 37 is one which would be allowable as deduction u/s 37(1). In order to attract the provision of sub-section (4), it must first be established that it is an expenditure which is covered by section 37(1). Section 37(1) refers to expenditure: (i) which is not an expenditure of the nature described in section 30; (ii) which is not an expenditure of capital nature and (iii) which is not personal expenditure of the assessee. Since the expenditure in question was an expenditure in the nature described in section 30, it would not fall u/s 37(1). The expenditure which was incurred by the assessee in this behalf was not on a lavish scale. Thus, there was no element of entertainment expenditure in it and in view of the decision of this Court in *CIT vs. Patel Bros. & Co. Ltd.* (1977) 106 ITR 424, the same was rightly held as allowable expenditure.

Cases referred to:

1. *CIT vs. Kaira Distt. Cooperative Milk Producers Union Ltd.* (1991) 105 Taxation 222 (Guj.); (1991) 192 ITR 608 (Guj.)
2. *CIT vs. Ahmedabad Mfg. & Calico Printing Co. Ltd.* (1992) 197 ITR 538 (Guj.)
3. *CIT vs. Patel Bros. & Co. Ltd.* (1977) 106 ITR 424 (Guj.)

Full text of the Judgment is given below :

JUDGMENT

(G.T. Nanavati, J.)

At the instance of the revenue, the Tribunal has referred the following three questions to this Court, under section 256(1) of the Income-tax Act, 1961 ('the Act'), for its opinion :

"1. Whether, on the facts and in the circumstances of the case, the amount of Rs. 69,076 being expenses incurred on current repairs of the guest house Villa 7 at Porbandar is not disallowable under section 37(4) of the Income-tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the expenditure of Rs. 69,076 incurred on current repairs is allowable under section 30 of the Income-tax Act, 1961 ?

3. Whether, on the facts and in the circumstances of the case, the expenditure of Rs. 36,329 on messing and tea cannot be disallowed as entertainment expenditure under section 37(2B) of the Income-tax Act, 1961 ?"

During the assessment proceedings for the A.Y. 1976-77, the assessee claimed deduction in respect of various items of expenditure. It had claimed deduction of Rs. 36,329/- being the messing expenses and part of tea expenses. They also claimed deduction of Rs. 69,076/- being the expenses incurred on current repairs of the guest house Villa 7 at Porbandar. Both these expenditures were disallowed by the ITO on the ground that the first expenditure being in the nature of entertainment was required to be disallowed u/s 37(2B) of the Act and the other expenditure was not allowable u/s 37(4).

The AAC disagreed with this view of the ITO and allowed both the claims.

The revenue, therefore, approached the Tribunal by way of an appeal and in that appeal the Tribunal also confirmed the view taken by the AAC. It, therefore, moved the Tribunal for referring the above-stated three questions to this Court.

As can be seen from the questions, question Nos. 1 and 2 pertain to the same expenditure of Rs. 69,076 being the expenses incurred on current repairs of the assessee's guest house at Porbandar. What is contended by the learned counsel for the revenue is that Villa 7 maintained by the assessee at Porbandar was admittedly a guest house and, therefore, section 37(4) was attracted in this case, and that it was not open to the assessee to claim deduction of that amount under section 30 of the Act. This contention raised on behalf of the revenue cannot be accepted in view of the two decisions of this Court in *CIT vs. Kaira Distt. Co-operative Milk Producers Union Ltd.* (1991) 192 ITR 608 and *CIT vs. Ahmedabad Mfg. & Calico Printing Co. Ltd.* (1992) 197 ITR 538. The view taken by this Court is that the expenditure which is referred to in clause (i) of sub-section (4) of section 37 is one which would be allowable as deduction u/s 37(1). In order to attract the provisions of sub-section (4), it must first be established that it is an expenditure which is covered by section 37(1). Section 37(1) refers to expenditure: (i) which is not an expenditure of the nature described in section 30; (ii) which is not an expenditure of capital nature and (iii) which is not personal expenditure of the assessee. Since the expenditure in question was an expenditure in the nature described in section 30, it would not fall u/s 37(1). The Tribunal was, therefore, right in taking the view that it was not disallowable under section 37(4) and that it was allowable under section 30.

At regards the messing and tea expenses, it has been found as a matter of fact by the Tribunal that the meals which was supplied to staff members and visitors was quite simple. The Tribunal has specifically stated that the expenditure, which was incurred by the assessee in this behalf was not on a lavish scale. Thus, there was no element of entertainment expenditure in it and in view of the decision of this Court in *CIT vs. Patel Bros & Co. Ltd.* (1977) 106 ITR 424, the same was rightly held as allowable expenditure as it was not hit by section 37(2B).

We, therefore, answer all the three questions in the affirmative, that is against the revenue and in favour of the assessee. No order as to costs.

(1995) 126 Taxation 118 (Kar.)

IN THE HIGH COURT OF KARNATAKA

(Before Hon'ble Chief Justice Mr. S.P.Bharucha & Hon'ble Mr. Justice K. Shivashankar Bhat)

IT Reference Nos. 104 and 105 of 1987

Commissioner of Income-tax

vs.

H.M.T. Ltd. (No. 1)

For the Appellant	:	**H. Raghavendra Rao and M.V. Seshachala**
For the Respondent	:	**K.P. Kumar**
Decided on	:	13.4.1992

DEDUCTIONS — Assessee claiming deduction u/s 80J from profits and gains on newly established undertaking — Assessee claiming while computing capital employed value of assets and capital used for scientific research to be added — Revenue negativing the claim of the assessee — Held, deduction u/s 80J to be computed including the value of capital assets employed for scientific research.

Income-tax Act, 1961 — Section 80J.

DEDUCTION — Assessee claiming while computing profit u/s 80J and 80HH profits from new industrial undertakings are commercial profits — Held, profits as computed in the manner laid down u/s 80AB as if each industrial undertaking separate to be considered.

Income-tax Act, 1961 — Sections 80J, 80-HH and 80AB.

FACTS

These are cross references both by the assessee and the revenue. A number of questions were referred. However, only the undermentioned two questions which were not covered by earlier decision have been considered in detail. The A.Y. involved is 1981-82. The important question involved in the reference of the revenue is whether the Tribunal was right in law in holding that deduction u/s 80J has to be computed

ıcluding the value of capital assets used for scientific purpose. The ım of Rs. 44,10,303/-, admittedly, is the value of the capital assets ·lating to scientific research. While working out the deduction u/s 80J the Act in respect of the watch factory of the assessee, this was sought be excluded by the revenue on the ground that the term 'actual cost' sed in section 80J(1A)(II)(ii) has to be understood in the manner stated ı section 43(1) of the Act and for this purpose Explanation 1 to section 3(1) also will have to be considered. This Explanation in turn refers section 32(1)(ii) of the Act which provides for depreciation on buildings, ıachinery, plant or furniture owned by the assessee and used for the urposes of business, etc. According to the revenue, when an asset is sed in the business after it ceases to be used for scientific research :lated to that business, the actual cost of the asset to the assessee, ıhen the said asset is used in the business, therefore, will be the value erived after deducting the depreciation granted to the said asset when was used for scientific research. Section 35 of the Act provides for ıe expenditure on scientific research and as per clause (iv) of section 5(1), in respect of expenditure on scientific research any expenditure f a capital nature on scientific research is allowed when it is related ɔ the business carried on by the assessee and sub-section (2) provides ɔr the computation of the deduction. When an assessee uses the assets ɔr scientific research and avails of such deductions, according to the ɛvenue, the value of the asset would get reduced to the extent of the eductions by the time the asset is diverted for user in the main business f the assessee. This contention was not accepted by the Tribunal. The ribunal observed that, "it is not denied that the assets are still being sed for scientific research" and, therefore, these assets are not entitled ɔ any depreciation at all but for a deduction u/s 35(1)(iv). The Tribunal ırther observed that, for the purpose of section 80J, the meaning of ıe term 'actual cost' stated in section 43(1) without reference to :xplanation 1 has to be applied. The Tribunal also has noted that it ıas not the case of the revenue that the assets in question are not used ɔr the business of the assessee, they cannot be excluded from the capital f the company. This was the view taken by the CIT (A) as well as by he Tribunal and the question before us was argued on the basis that his assumption is factually correct.

he second question which was referred at the instance of the assessee ıas whether the Tribunal was right in holding that for purposes of Sections 80J and 80HH of the Act profits and gains from new underaking are not commercial profits but such profits as are computed in he manner laid down under the Act pursuant to Section 80AB as if ach undertaking was of separate assessee.

DECISION

[illegible]

provisions of section 43(1) are quite clear when it says that the actual cost is that which is incurred by the assessee. To the extent any portion of the cost is met directly or indirectly by any other person or authority, to that extent the actual cost of the assessee gets reduced. A deduction granted u/s 35 cannot be equated to a situation where a portion of the cost is being met by a third party because section 35 provides only a statutory deduction under certain circumstances. The learned counsel for the revenue, however, sought to rely on *Explanation* 1. According to the learned counsel, when the assets ceased to be used for scientific research and a deduction is to be made u/s 32(1)(ii), the actual cost of the asset to the assessee would get reduced by the amount of deduction allowed u/s 35(1)(iv) and, according to the learned counsel, that is the situation involved here. The above contention ignores the scope of this *Explanation*. *Explanation* 1 is attracted only when a deduction has to be made u/s 32(1)(ii). The applicability of the *Explanation* is confined to the particular situation stated therein. It nowhere extends to other situations wherein actual cost will have to be computed for any other purpose. Hence, it is not possible for us to accept the contention of the learned counsel. Therefore, this question is answered in the affirmative and in favour of the assessee. With regard to the second question, the Hon'ble Court examined the matter in detail for the purpose of computing the deduction under any section in Part-C of Chapter VI-A of the Act, inspite of that section, the amount of income of the nature referred to in that other section shall alone be deemed to be the amount of income of that nature. Mr. Kumar contended that section 80-I(6) is quite clear, elaborate and specific. That may be so, but a different phraseology used in section 80AB cannot deprive it of its content and full effect will have to be given to the language used by the section, however, clumsily it may have been drafted. Therefore, the Tribunal was justified in holding that, for the purposes of sections 80J and 80HH of the Act profits and gains of new undertakings are not commercial profits but only such profits as are computed in the manner laid down under the Act in pursuance of section 80AB, as if each undertaking was a separate assessee. The question referred to us is answered in the affirmative and in favour of the revenue.

Cases referred to :

1. *CIT vs. Bangalore Turf Club Ltd.* (1984) 150 ITR 23 (Kar.).
2. *CIT vs. H.M.T. Ltd. (No. 2)* (1993) 203 ITR 818 (Kar.)
3. *CIT vs. Motor Industries Co. Ltd.* (1988) 173 ITR 374 (Kar.)
4. *Ravi Machine Tools (P) Ltd. vs. CIT* (1978) 114 ITR 459 (Kar.)

Full text of the Judgment is given below :

JUDGMENT

(K. Shivashankar Bhat, J.)

In these references five questions are referred for our consideration at the

instance of the revenue and the sixth question is referred at the instance of the assessee. The references are under section 256(1) of the Income-tax Act, 1961 ('the Act') pertaining to the assessment year 1981-82. The questions read thus:

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the Commissioner (Appeals) who directed the Inspecting Assistant Commissioner to allow depreciation on roads, walls and fences?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the Commissioner (Appeals) who directed the Inspecting Assistant Commissioner to allow extra shift allowance on water system and sanitation ?

3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the Commissioner (Appeals) who directed the Inspecting Assistant Commissioner to allow depreciation on capitalised loss on account of day-to-day fluctuation in foreign exchange rates ?

4. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in allowing the assessee's claim for deduction under section 35(1)(iv) of the Income-tax Act, 1961, in respect of the value of capital work-in-progress, machinery and equipment in transit and under erection at the assessee's research and development division ?

5. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the Commissioner (Appeals) who held that deduction under section 80J has to be computed including the value of capital asset of Rs. 44,10,303 ? and

6. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that for purposes of sections 80J and 80HH of the Act, profits and gains from new undertakings are not commercial profits but such profits as are computed in the manner laid down under the Act pursuant to section 80AB as if each undertaking was a separate assessee ?"

The first four questions need not detain us because they are all covered by one or the other decision of this Court.

The first question is covered by the decision of this Court in *CIT vs. Bangalore Turf Club Ltd.* (1984) 150 ITR 23. Following the said decision, the question is answered in the affirmative and in favour of the assessee.

The second question is covered by the decision rendered in the very assessee's case in *CIT vs. H.M.T. Ltd.* (No. 2) (1993) 203 ITR ITR 818

(Kar.) (infra). Following the said decision, the question is answered in the affirmative and in favour of the assessee.

The third question is covered by the decision of this Court in *CIT vs. Motor Industries Co. Ltd.* (1988) 173 ITR 374. Following the said decision, the question is answered in the affirmative and in favour of the assessee.

The fourth question is covered by the decision of this Court in *Ravi Machine Tools (P) Ltd. vs. CIT* (1978) 114*459. Following the said decision, the question is answered in the affirmative and in favour of the assessee.

Re. : Question No. 5 :

The sum of Rs. 44,10,303/-, admittedly, is the value of the capital assets relating to scientific research. While working out the deduction u/s 80J of the Act in respect of the watch factory of the assessee, this was sought to be excluded by the revenue on the ground that the term 'actual cost' used in section 80J(1A)(II)(ii) has to be understood in the manner stated in section 43(1) of the Act and for this purpose *Explanation 1* to section 43(1) also will have to be considered. This *Explanation* in turn refers to section 32(1)(ii) of the Act which provides for depreciation on buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business, etc. According to the revenue, when an asset is used in the business after it ceases to be used for scientific research related to that business, the actual cost of the asset to the assessee, when the said asset is used in the business thereafter, will be the value derived after deducting the depreciation granted to the said asset when it was used for scientific research.

Section 35 of the Act provides for the expenditure on scientific research and as per clause (iv) of section 35(1), in respect of expenditure on scientific research, any expenditure of a capital nature on scientific research is allowed when it is related to the business carried on by the assessee and sub-section (2) provides for the computation of the deduction. When an assessee uses the assets for scientific research and avails of such deductions, according to the revenue, the value of the asset would get reduced to the extent of the deduction by the time the asset is diverted for user in the main business of the assessee.

This contention was not accepted by the Tribunal. The Tribunal observes that, "it is not denied that the assets are still being used for scientific research" and, therefore, these assets are not entitled to any depreciation at all but for a deduction under section 35(1)(iv). The Tribunal further observed that, for the purpose of section 80J, the meaning of the term 'actual cost' stated in section 43(1) without reference to *Explanation 1* has to be applied. The Tribunal also has noted that it was not the case of the revenue that the assets in question are not used for the business of the industrial undertaking; since these assets are also used for the business of the assessee, they cannot be excluded from the capital of the company. This was the view taken by

the Commissioner (Appeals), as well as by the Tribunal and the question before us was argued on the basis that this assumption is factually correct.

Section 80J provides for deduction in respect of profits and gains from newly established industrial undertakings, etc. For this purpose, the capital employed in the industrial undertaking of the assessee will have to be computed in the manner specified in sub-section (1A). This again takes us to sub-clause (ii) of section 80J(1A)(II).According to this, the value of the assets shall be ascertained thus : "in the case of assets acquired by purchase and not entitled to depreciation, their actual cost to the assessee". *Explanation 1* states that, "In this clause, 'actual cost' has the same meaning as in clause (1) of section 43". There is no dispute that these provisions govern the instant case and, therefore, the only question actually that would survive for consideration will be the scope of the *Explanation* pertaining to the term 'actual cost' which takes us to section 43, to the extent it is relevant for our purpose, reads thus:

> "*Definitions of certain terms relevant to income from profits and gains of business or profession.* - In sections 28 to 41 and in this section, unless the context otherwise requires -
>
> (1) 'actual cost' means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority:
>
> Provided that where the actual cost of an asset, being a motor car which is acquired by the assessee after the 31st day of March, 1967, but before the 1st day of March, 1975, and is used otherwise than in a business of running it on hire for tourists, exceeds twenty-five thousand rupees, the excess of the actual cost over such amount shall be ignored, and the actual cost thereof shall be taken to be twenty-five thousand rupees.
>
> *Explanation* 1 : Where an asset is used in the business after it ceases to be used for scientific research related to that business and a deduction has to be made under clause (ii) of sub-section (1) of section 32 in respect of that asset, the actual cost of the asset to the assessee shall be the actual cost to the assessee as reduced by the amount of any deduction allowed under clause (iv) of sub-section (1) of section 35 or under any corresponding provision of the Indian Income-tax Act, 1922 (11 of 1922)."

The main provisions of section 43(1) are quite clear when it says that the actual cost is that which is incurred by the assessee. To the extent any portion of the cost is met directly or indirectly by any other person or authority, to that extent the actual cost of the assessee gets reduced. A deduction granted u/s 35 cannot be equated to a situation where a portion of the cost is being met by a third party because section 35 provides only a statutory deduction under certain circumstances. The learned counsel for the revenue, however, sought to rely on *Explanation* 1. According to the

learned counsel, when the assets ceased to be used for scientific research and a deduction is to be made u/s 32(1)(ii), the actual cost of the asset to the asesee would get reduced by the amount of deduction allowed u/s 35(1)(iv) and, according to the learned counsel, that is the situation involved here.

The above contention ignores the scope of this *Explanation*. *Explanation* 1 is attracted only when a deduction has to be made u/s 32(1)(ii). The applicability of the *Explanation* is confined to the particular situation stated therein. It nowhere extends to other situations wherein actual cost will have to be computed for any other purpose. Hence, it is not possible for us to accept the contention of the learned counsel. Therefore, this question is answered in the affirmative and in favour of the assessee.

Re. : Question No. 6 :

Section 80AB of the Act was introduced with effect from 1.4.1981, and therefore, it governs the assessment year in question. On this aspect, there is no dispute. The section reads as follows :

> "*Deductions to be made with reference to the income included in the gross total income* - Where any deduction is required to be made or allowed under any section (except section 80M) included in this Chapter under the heading 'C - Deductions in respect of certain incomes' in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."

This say that, for the purpose of computing the deduction under any section in Part-C of Chapter VI-A of the Act, in spite of that section, the amount of income of the nature referred to in that other section shall alone be deemed to be the amount of income of that nature. Mr. Kumar contended that section 80-I(6) may be compared with s. 80AB and pointed out that section 80-I(6) is quite clear, elaborate and specific. That my be so, but a different phraseology used in section 80AB cannot deprive it of its content and full effect will have to be given to the language used by the section, however, clumsily it may have been drafted. Therefore, the Tribunal was justified in holding that, for the purposes of sections 80J and 80HH of the Act profits and gains of new undertakings are not commercial profits but only such profits as are computed in the manner laid down under the Act in pursuance of section 80AB, as if each undertaking was a separate assessee. The question referred to us is answered in the affirmative and in favour of the revenue.

The references are, accordingly, answered.

(1995) 126 Taxation 125 (Del.)

IN THE HIGH COURT OF DELHI

(Before Hon'ble Mr. Justice K. Shivashankar Bhat & Hon'ble Mr. Justice D.K. Jain)

IT Reference No. 271 of 1977

Balak Ram (HUF)

vs.

Commissioner of Income-tax

For the Appellant	:	**None**
For the Respondent	:	**B. Gupta and D.N. Malhotra**
Decided on	:	25.8.1994

HINDU UNDIVIDED FAMILY — Assessee deriving remuneration as director of a company — Prior to conversion of company a partner in the firm — Firm converted to company — All the funds invested by the company — Articles of association appointing assessee as managing director for life — Assessee claiming income to be taxed in his individual hand — Held, income received with the aids of funds of HUF — Income rightly taxed in the hands of the HUF.

Income-tax Act, 1961 — Section 4.

FACTS

The funds for the allotment of the shares in the company to director and his son were the funds of the assessee-HUF ; and (2) that the said revenue received by Balak Ram, the karta of the assessee-HUF, from the company in question, has been taxed in the hands of the assessee-HUF right upto the accounting period relevant to the A.Y. 1971-72. The history of the formation of the company also shows that out of the larger HUF, the smaller HUF formed the partnership and subsequently converted themselves into a limited company. In these circumstances the articles of association of the company specifically provided for Balak Ram to be appointed as Director for life. The Tribunal ultimately concluded that the remuneration paid to said Balak Ram belonged to the HUF. Here the assessee-HUF owns at least 1/2 shares of the company. The company was floated with the funds of the family. Balak Ram himself contributed nothing. The remunerations payable to him were fixed under the articles of association. The remuneration received in the past by Balak Ram has been credited to the account of the family and not to his personal account.

DECISION

The Hon'ble Court held that the income received by a member of a Hindu undivided family from a firm or a company in which funds of the Hindu undivided family are invested, even though the income may be partially

traceable to personal exertion of the member, is taxable as the income of the Hindu undivided family, if it is earned by detriment to the family funds or with the aid or assistance of those funds, otherwise it is taxable as the member's separate income.

Case referred to :

P.N. Krishna Iyer vs. CIT (1969) 73 ITR 539 (SC)

Full text of the Judgment is given below :

JUDGMENT

(K. Shivashankar Bhat, J.)

This is a reference under section 256(1) of the Income-tax Act, 1961 ('the Act') in respect of the assessment year 1972-73, at the instance of the assessee. The question referred reads as follows:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the remuneration received by Shri Balak Ram, karta of the assessee-HUF, was assessable in assessee's hands?"

The Tribunal in its order states that it was not in dispute that (1) that the funds for the allotment of the shares in the company to Balak Ram (Director) and his son Vijay Kumar were the funds of the assessee-HUF ; and (2) that the said revenue received by Balak Ram, the karta of the assessee-HUF, from the company in question, has been taxed in the hands of the assessee-HUF right upto the accounting period relevant to the A.Y. 1971-72 and that this revenue received by Balak Ram and other income of the assessee-HUF were being merged wity each other. The history of the formation of the company also shows that out of the larger HUF, the smaller HUF formed the partnership and subsequently converted themselves into a limited company. Thus, the respective shares of all concerned persons certainly belonged to the erstwhile larger HUF. It is in these circumstances and having regard to the facts that the articles of association of the company specifically provided for Balak Ram to be appointed as Director for life, the Tribunal ultimately concluded that the remuneration paid to said Balak Ram belonged to the HUF. The relevant finding of the Tribunal is as follows :

> "Here the assessee-HUF owns at least 1/? shares of the company. The company was floated with the funds of the family. Balak Ram himself contributed nothing. Balak Ram was appointed as Director under the articles of association of the company. The remunerations payable to him were fixed under the articles of association. The remuneration received in the past by Balak Ram has been credited to the account of the family and not to his personal account. On these facts an irresistible conclusion emerges that Balak Ram became the managing director because of the joint shares held by his family and not on account of any personal qualification and that the remunerations paid to him were

> the income of the assessee-HUF. Even if there was some element of personal service, that would not change the character of the income."

We do not find any error in the approach of the Tribunal. The finding is fully justified in view of the decision of the Supreme Court in *P.N. Krishna Iyer vs. CIT* (1969) 73 ITR 539. The relevant test had been propounded by the Supreme Court as follows :

> "Income received by a member of a Hindu undivided family from a firm or a company in which funds of the Hindu undivided family are invested, even though the income may be partially traceable to personal exertion of the member, is taxable as the income of the Hindu undivided family, if it is earned by detriment to the family funds or with the aid or assistance of those funds; otherwise it is taxable as the member's separate income." (p. 539)

In view of the above, we have no hesitation in agreeing with the conclusion reached by the Tribunal. The question referred to us is answered in the affirmative and in favour of the revenue. No costs.

(1995) 126 Taxation 127 (Mad.)

IN THE HIGH COURT OF MADRAS

(Before Hon'ble Mr. Justice Gulab C. Gupta &
Hon'ble Mr. Justice Thanikkachalam)

Tax Case No. 708 of 1982

Commissioner of Income-tax

vs.

T.G.K. Raman

For the Appellant	:	**N.V. Balasubramanian**
For the Respondent	:	**P.P.S. Janardhana Raja**
Decided on	:	25.8.1994

CLUBBING OF INCOME — Assessee creating trust for the benefit of minor son — Trust deed providing benefit to be passed on to the son only after his attaining age of 21 years — Trustees prohibited to pay any money, confer any benefit or transfer any asset to their beneficiary unless attaining such age — Revenue including dividend income in the hands of the father — Held, no income accrued to the minor and dividend income not taxable in the hands of the assessee.

Income-tax Act, 1961 — Section 64(1)(v).

FACTS

During the A.Y. 1965-66, the assessee created a trust of 3200 shares for the benefit of his minor son. The income from the trust was to go to the son only after attaining the age of majority. No benefit was to

pass to the son during his minority and the trustees were also debarred from conferring any right in respect of such assets on the minor. The department included the income from dividend in the hands of the father. It was argued by the department that since the income was to go to the minor only on attaining majority, till that time it belonged to the assesee. It was alternatively argued that it was an indirect transfer to the minor. The AAC *and the Tribunal upheld the contention of the assessee and held that no income was to be added in the hands of the father. Being aggrieved, the revenue filed reference.*

DECISION

The Hon'ble Court held that since the benefit of the trust would not go to the minor during his minority and the trustees have no power to pay any money or transfer any asset or confer any benefit on the beneficiary before he attained the age of 21: Neither the corpus nor the interest occurring therefrom thus vested with the minor during his minority. No doubt Section 64(1)(vii) applies even if the trust is for deferred benefit of the minor but deferred benefit means benefit deferred to the subsequent accounting year in which the taxable income is not deferred beyond minority. In other words, the benefit has to go to the minor during minority if the provisions of Sec. 64(1)(vii) are to be applied. Here the income is accumulated and added to the corpus and both the increased corpus or the income has to be given to the minor after attaining majority. The Tribunal was thus justified in holding the income arising out of the shares belonging to the trust was not taxable in the hands of the assessee who was the father of the minor.

Cases referred to:

1. *Yogindraprasad N. Mafatlal vs. CIT* (1977) 109 ITR 602 (Bom.)
2. *Addl. CIT vs. M.K. Doshi* (1980) 122 ITR 499 (Guj.)
3. *CIT vs. T. Ponnaiah* (1988) 172 ITR 269 (AP)
4. *CIT vs. M.D. Veeranarasimhaiah* (1988) Taxation 91(3) (Kar.); (1988) 174 ITR 435 (Kar.)
5. *CIT vs. Manilal Dhanji* (1962) 44 ITR 876 (SC)
6. *Chhanganlal Baid vs. CIT* (1971) 79 ITR 258 (Cal.)
7. *CWT vs. Seth Yogindraprasad N. Mafatlal* (1988) Taxation 90(3) 177 (Bom); (1988) 170 ITR 648 (Bom.)

Full text of the Judgment is given below :

JUDGMENT

(Thanikkachalam, J.)

At the instance of the department, the Tribunal has referred the following question for the opinion of this Court under section 256(1) of the Income-tax Act, 1961 ('the Act') for the assessment year 1975-76 :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in excluding the sum of Rs. 1,472 being the dividend in respect of the share dealt with by the assessee under the settlement deed dated 26.3.1974 included under section 64(1)(v) of the Income-tax Act, 1961?"

In the assessment year under consideration, the assessee had transferred 3,200 shares in Rane Brake Linings Ltd. to a discretionary trust created on 27.3.1974 for the benefit of his minor son T.G.G. Raman. Relying upon section 64(1)(v) of the Act, the ITO included the income arising out of the shares in the hands of the assessee for the assessment year under consideration. On appeal, following his earlier order, the AAC directed the ITO to exclude the dividend income arising out of the value of the shares transferred to the trust. On appeal, the Tribunal confirmed the order passed by the AAC in deleting the dividend income arising out of the shares transferred by the assessee to the trust for the benefit of his minor son.

Before us, the learned standing counsel for the Income-tax Department contended that even though the amounts were payable to the beneficiary only after he attained the age of 21, the money was held for the benefit of the minor being accumulated during the period of his minority. The mere fact that it was to be received by the minor after he attained the age of 21 did not make the settlement ineffective. The income from the said shares accrued to the minor only, the enjoyment thereof was postponed. Alternatively it was submitted that under the trust deed the income from the trust was to go to the son only after attaining majority. Till that time it belonged to the assessee, the amount not having been transferred to the beneficiary. It was further pointed out that there was difference in wordings between the provisions of 1922 and 1961 Acts. Under the later Act even the conferment of deferred benefit on the minor brought the section into operation.

The learned counsel appearing for the assessee pointed out that there was not even a deferred payment in this case to the minor, that the payment was clearly being made only to a major and, hence, the provisions of section 64 have no application at all. Therefore, according to the learned counsel for the assessee, even according to the trust deed, the income from the trust was to go to the son only after his attaining majority. It was, therefore, pleaded that the trust was created not for the benefit of the minor but for the benefit of the major even though at the relevant point of time, he was a minor. Hence, it was submitted that the Tribunal was correct in deleting the dividend income instead of including the same in the hands of his father under section 64(1)(v).

We have heard the rival submissions. Clause 6 of the trust deed states as under :

"Nothing in this indenture shall be deemed or construed to confer any

right of the beneficiary to receive any payment or benefit under the trust until after he has attained the age of 21 years and the trustees shall have no power to pay any money or transfer any assets or confer any benefit on the beneficiary before he attains the said age of 21."

This would go to show that the benefit of the Trust would go to the minor not during his minority; but the benefit would go to him after he attains the age of 21 years. The trust shall have no power to pay any money or transfer any asset or confer any benefit on the beneficiary before the minor attains the age of 21. The trust deed further says that the corpus and the interest accrued thereon are not vested with the minor during his minority. Clause (vii) of section 64(1) applies even if the trust is for the deferred benefit of the minor child and the minor child derives no benefit under the trust in the accounting year. The deferred benefit here means benefit deferred to a year subsequent to the accounting year in which the income is taxable, so long as it is not deferred beyond the minority of the child. The reason is that section requires the income to be for the benefit of ...minor child, even when the benefit is deferred; in other words, the benefit should go to the child now or later, but during his minority. Thus, clause (vii) of section 64(1) would not apply if the income during the minority is to be accumulated and added to the corpus and the increased corpus or the income therefrom has to be given to the child after attaining majority. This was the view taken by the Bombay, Gujarat, Andhra Pradesh and Karnataka High Courts in the decisions *Yogindraprasad N. Mafatlal vs. CIT* (1977) 109 ITR 602, *Addl. CIT vs. M.K. Doshi* (1980) 122 ITR 499 (Guj.), *CIT vs. T. Ponnaiah* (1988) 172 ITR 269 and *CIT vs. M.D. Veeranarasimhaiah* (1988) 174 ITR 435 (Kar.) respectively. The Tribunal in its decision followed the judgment of the Supreme Court in the case of *CIT vs. Manilal Dhanji* (1962) 44 ITR 876 wherein it was held that clause (vii) of section 64(1) would not apply if the income during the minority is to be accumulated and added to the corpus and the increased corpus or the income therefrom is to be given to the child after attaining majority. This was held while interpreting the provisions of section 16(3)(b) of the Indian Income-tax Act, 1922. But on principle this decision would be applicable even while interpreting the provisions of section 64(1)(vii). The Tribunal has also followed another decision of the Calcutta High Court in the case of *Chhaganal Baid vs. CIT* (1971) 79 ITR 258 wherein the Calcutta High Court also came to the same view as adumbrated by the Supreme Court in the abovesaid decision.

Our attention was drawn to another decision of the Bombay High Court in *CWT vs. Seth Yogindraprasad N. Mafatlal* (1988) 170 ITR 648 and it was submitted that this was in relation to the same trust which was considered in *Yogindraprasad's* case (supra). But it remains to be seen that the decision of the Supreme Court in *Manilal Dhanji's* case (supra) was not taken into consideration in *Seth Yogindra Prasad's* case (supra).

This decision proceeds on the basis of the assumption that the trust was for the benefit of the minor daughter. The position in the instant case is different. A plain reading of the trust deed in the instant case would go to show that the benefit was not given to the minor during his minority. But the benefit was given to the major son. If that is so, the provisions of section 64(1)(v) would not be applicable to the facts of the present case. So, even on the facts and in accordance with law, the order passed by the Tribunal in deleting in the income arising out of the shares belonging to the trust in the hands of the assessee who is the father of the minor, is in order. Accordingly, we answer the question referred to us in the affirmative and against the department. Counsel fee Rs. 1,000.

(1995) 126 Taxation 131 (All.)

IN THE HIGH COURT OF ALLAHABAD

(Before Hon'ble Justice Mr. R.K. Gulati & Hon'ble Justice Mr. S.C. Verma)

IT Application No. 284 of 1992

Commissioner of Income-tax

vs.

Sarvodaya Furnishers & Electricals (P) Ltd.

Decided on : 26-11-1993

REFERENCE — ITO adding Rs. 50,000/- as income from other sources — Tribunal deleting the amount after considering additional evidence — Tribunal holding identity of depositor, source of deposit proved — Revenue applying for reference — Reference application rejected — Application filed before High Court for direction to Tribunal to refer the case — Held, Tribunal not considering evidence covering all matters — Evidence on essential matters ignored — Fresh evidence admitted by Tribunal — Tribunal directed to refer the question of law.

Income-tax Act, 1961 — Section 256(2).

FACTS

M/s Sarvodaya Furnishers & Electricals (P) Ltd., Meerut, the respondent, is a private limited company registered under the Companies Act. The dispute is in respect of the A.Y. 1985-86. During the course of the assessment proceedings for that year the ITO noticed certain deposits in the account books of the assessee and one of such deposit was Rs. 50,000/- appearing the name of Ratish Chand Gupta. The ITO being not satisfied with the explanation of the assessee, brought to tax the deposit in question as the income of the assessee as income from undisclosed sources u/s 68 of the IT Act. The assessment order was upheld

by the CIT(A). The Tribunal deleted the addition saying that the identity of the depositer and the source of the deposit had been proved from the overwhelming evidence that had been placed before the CIT(A). It was contended that the Tribunal while recording its decision has not addressed itself to the various aspects on which the addition in question was made by the ITO. Further, the additional evidence on which the Tribunal rested its decision had not been admitted by the CIT(A) which was filed before him. Moreover, the Tribunal acted upon the additional evidence on its face value without directing any inquiry as to its correctness.

DECISION

The Hon'ble Court held that their jurisdiction was limited only to consider whether the order of the Tribunal died give rise to any question of law or not. The proposition stated by the learned Counsel for the assessee that the order of the Tribunal is concluded by findings of fact, as the deposit has been accepted as genuine, is not acceptable in the broad manner it is stated. At the same time is is a trite position of law that where the Tribunal does not consider the evidence covering all the essential matter and bases its findings upon some evidence only, ignoring the other essential matters; or reaches it conclusion brushing aside the conclusions or the findings recorded by the authorities below without giving any reasons, in such a situation the findings of the Tribunal though of facts, are liable to be interfered within the proceedings u/s 256 of the Act. The Hon'ble Court was, therefore, of the opinion that the order of the Tribunal did give rise to a question of law. Accordingly, the Tribunal was directed to draw up a statement of fact and to refer the aforesaid question for the opinion of the Court.

Cases referred to :

1. *CIT vs. Elekchand Jain* (1988) 71 ITR 308 (MP)
2. *CIT vs. Raza Textiles Ltd.* (1987) UPTC 1984 (All.)

Full text of the Judgment is given below :

JUDGMENT

(R.K. Gulati, J.)

The CIT, Meerut, has made this application under s. 256(2) of the IT Act (for short, the 'Act') with a prayer that the Tribunal, New Delhi (Bench-A) may be required to refer the following question as a question of law to this Court for its opinion :

> "Whether, in the circumstances of the case, the Tribunal was legally correct to delete the credit appearing in the name of Shri Ratish Chand Gupta ?"

We have heard learned standing counsel and Shri P.K. Jain who appeared on behalf of the respondent.

M/s Sarvodaya Furnishers & Electricals (P) Ltd., Meerut—the respondent-is a private limited company registered under the Companies Act. The dispute is in respect of the asst. yr. 1985-86. During the course of the assessment proceedings, for that year the ITO noticed certain deposits in the account books of the assessee and one of such deposit was of Rs. 50,000 appearing in the name of Ratish Chand Gupta. To substantiate the plea that the deposit in question was genuine and the money was taken on loan, the assessee filed a confirmation from the depositor which was to the effect :

> "I confirm the above account, I am assessed to income-tax in Circle-I(4), Meerut."

An initial inquiry into the matter conducted by an Income-tax Inspector revealed that there was no assessee by the name of Ratish Chand Gupta in the Circle mentioned in the confirmation. Subsequently the assessee submitted certain assessment order said to have been made in the name of the depositor. However, the ITO being not satisfied with the explanation of the assessee, he brought to tax the deposit in question as the income of the assessee from undisclosed source under s. 68 of the IT Act.

In appeal the assessment order was upheld by the CIT(A). On further appeal when the matter came before the Tribunal it deleted the addition by saying that the identity of the depositor and the source of the deposit had been proved from the overwhelming evidence that had been placed before the CIT(A).

Learned standing counsel contended that the order of the Tribunal does give rise to a question of law proposed in the application. It was contended that the Tribunal while recording its decision has not addressed itself to the various aspects on which the addition in question was made by the ITO. Further, the additional evidence on which the Tribunal rested its decision had not been admitted by the CIT(A) which was filed before him. It was contended that the Tribunal could not have relied upon the additional evidence without recording a finding that the CIT(A) had erred in rejecting the additional evidence. Moreover, the Tribunal acted upon the additional evidence on its face value without directing any inquiry as to its correctness.

On a consideration of the assessment order we find that the ITO has referred to a number of circumstances in support of his conclusion that the deposit in question was not genuine. For instance, we found that there was no past assessment record of the depositor on 24th Sept., 1987 when he filed the confirmation not was he an assessee of Circle I(4), Meerut, as asserted in the confirmation. It was found as a fact that for the first time on 7th Oct., 1987 returns of income for the asst. yrs. 1985-86 to 1987-88 were filed and the assessment was completed on 21st Oct., 1987. The income returned for those years was in the tune of Rs. 15,000 to Rs. 18,100 under the head 'Income from interest/commission/business" and no further details

were either given or were available. The process server could not serve the assessment order on the address given as the depositor was not traceable on that address. The deposit in question was made by cheque and an inquiry revealed that the amount represented by deposit was debited in the current account held in the name of M.K. Gupta & Sons, in the Union Bank of India, Begum Bridge, Meerut. The depositor was also examined on oath. He denied that the signatures on the confirmation were made by him. He also denied the signatures on the return said to have been filed by him of the years mentioned above. He categorically stated that he was not assessed to tax. The current account on which the cheque was drawn, revealed that on 7th Dec. 1984 when the amount was debited in that account, there was also a credit entry on that date of Rs. 38,000 under the remarks 'by clearing'. In the statement on oath the depositor, however, stated that he had made the deposit of Rs. 38,000 in cash. Subsequently, he stated that he may have Rs. 38,000 in cash to Sri Piyush Goel (director of the company) and he may have deposited the amount of Rs. 38,000 in his account. He could not give the details about the source of Rs. 38,000 which was deposited in his account on 7th Dec., 1984. Sri Piyush Goel was a close relation of the depositor. The ITO issued a notice to the assessee requiring its reply on the aforesaid matters, but no reply was filed despite two adjournments were taken. Before the CIT(A) it appears that some additional evidence was filed which the CIT(A) refused to entertain the same. It is not in dispute and it is also apparent from the order of the Tribunal that it has not addressed itself to the various matters on which the ITO based its conclusion. There is no finding recorded by the Tribunal that the CIT erred in refusing to entertain the additional evidence. There is also no finding that the additional evidence was of such a nature which required no further enquiry into its correctness.

Learned counsel for the assessee contended that whether the deposit is genuine or not, is essentially a question of fact and the application is liable to be rejected on that ground, particularly, when the identity of the depositer had been established. We will not like to comment on merits at this stage. Our jurisdiction is limited only to consider whether the order of the Tribunal does give rise to any question of law or not. The proposition stated by the learned counsel for the assessee that the of the Tribunal is concluded by findings of fact, as the deposit has been accepted as genuine, is not acceptable to us in the broad manner it is stated. It is true that in the hierarchy of authorities under the Act, the Tribunal is a final fact finding body and its decision on question of facts are, ordinarily, not liable to be questioned in these proceedings. At the same time it is a trite position in law that where the Tribunal does not consider the evidence covering all the essential matters and bases its findings upon some evidence only, ignoring the other essential matters; or reaches its conclusion brushing aside the conclusions or the findings recorded by the authorities below without giving any reasons,

in such a situation the findings of the Tribunal, though of facts, are liable to be interfered with in the proceedings under s. 256 of the Act. Likewise, where the Tribunal fails to consider the ground of fresh evidence in contravention of R. 46A, the order of the Tribunal will give rise to a question of law. This has been so held by a Division Bench of the Madhya Pradesh High Court in *CIT vs. Elekchand Jain* (1988) 171 ITR 308 (MP). In *CIT vs. Raza Textiles Ltd.* (1987) UPTC 1984 (All.), a Division Bench of this Court has held that an order of the Tribunal would give rise to a question of law where the Tribunal reverses the decision of the Revenue authorities in appeal without meeting the reasons recorded therein and the material referred in support thereof by the authorities below.

In view of the aforesaid discussion, in our opinion, the order of the Tribunal does give rise to a question of law. Accordingly we direct the Tribunal to draw up a statement of fact and to refer the aforesaid question for the opinion of this Court.

In the result the application succeeds and is allowed with costs which we assess at Rs. 150.

(1995) 126 Taxation 135 (Bom.)

IN THE HIGH COURT OF BOMBAY

(Before Hon'ble Justice Dr. B.P. Saraf & Hon'ble Mr. Justice D.R. Dhanuka)

IT Reference No. 389 of 1981

Commissioner of Income-tax

vs.

Dorr Oliver (India) Ltd.

For the Appellant	:	**Dr. V. Balasubramanian and J.P. Devadhar**
For the Respondent	:	**None**
Decided on	:	30-9-1993

SUR-TAX — Chargeable profits — Assessee claiming exclusion of interest received from banks from the chargeable profits — Condition that such receipt for the purpose of exclusion should be from Govt., local authority or Indian concern — Interest received by assessee from branches of foreign banks — One of the conditions interest received from Indian concerns not satisfied — Interest received by assessee non-resident company which has not made prescribed arrangement for declaration and payment of dividend not excludible from computation of chargeable profits — Indian concern means a concern which is Indian in character — Cannot be termed as Indian concern by reason of location in India.

Companies (Profits) Sur-tax Act, 1964 — Clause (x) of rule 1, Sch. I.

FACTS

The assessee is a non-resident company which had not made the prescribed arrangement fo the declaration and payment of dividends within India. During the previous year relevant to the A.Ys. 1972-73, 1973-74 and 1974-75, the assessee received certain amounts by way of "interest" from the First National City Bank and the Chartered Bank. The assessee claimed exclusion of the said amounts in computation of its "chargeable" profits under the Companies (Profits) Surtax Act, 1964. The claim of the assessee was rejected by the IAC who made the assessment. The assessee went in appeal before the CIT(A) who upheld the order of the IAC. On further appeal to the Tribunal, the Tribunal decided in favour of the assessee. The controversy revolved round the interpretation of clause (x) of Rule 1 of the First Schedule to the Sur-tax Act.

DECISION

A reading of the clause (x) of Rule 1 makes it abundantly clear that in computing the chargeable profits of a non-resident company which has not made the prescribed arrangements for the declaration and payment of dividends within India, its income by way of -

(i) Interest ; or

(ii) fees for rendering technical services,

received from

(a) Government, or

(b) a local authority, or

(c) any Indian concern

is to be excluded from its total income. The contention of the assessee was that the words 'any interest' appearing in clause (x) of Rule 1 of the First Schedule to the Sur-tax Act stand by themselves and are not subject to the condition appearing thereafter, viz. 'received from Government or local authority or any Indian concern'. According to the assessee, the above condition applies only to 'fees for rendering technical services' and not to 'interest'. As a result, any interest received by the assessee falls in clause (x) irrespective of the source of the receipt. On the other hand, the contention of the Revenue is that the condition regarding the source of receipt is applicable to both types of income, i.e., 'interest' and 'fees'. The Hon'ble Court found it difficult to accept the contention of the assessee that the condition regarding source or receipt is not applicable to 'interest'. The expression 'any' preceding the word 'interest', is common to both 'interest' and 'fees'. It is well-settled rule of interpretation that a statutory provision has to be read as a whole in the context in which it appears. Words, indicative of any exclusion or condition, in the absence of any intention to the contrary, have to be given full effect. If we read clause (x) of Rule 1 of the First

Schedule as a whole, it is abundantly clear that it deals with two types of receipts - one, receipt by way of 'any interest' and another, receipt by way of 'fees for rendering technical services'. The Hon'ble Court was, therefore, of the clear opinion that interest received from a Govt. or a local authority or any Indian bank situated in India can be said to be exempt. On a careful consideration, the Hon'ble Court was of the opinion that the word 'Indian concern' means a concern which is Indian in character. A concern, which is not Indian, cannot be termed as 'Indian concern' merely by reason of its location in India. In view of the matter, the Hon'ble Court was of the opinion that the interest received by the assessee from the branches of the two foreign banks located in India cannot be deducted under Clause (x) of Rule 1 of the First Schedule Sur-tax Act. Accordingly, the reference was answered in favour of the revenue.

Case referred to :

Dr. J.M. Mokashi vs. CIT (1993) 115 CTR (Bom.) 73

Full text of the Judgment is given below :

JUDGMENT

(Dr. B.P. Saraf, J.)

By this reference under s. 256(1) of the IT Act, 1961 r/w s. 18 of the Companies (Profits) Surtax Act, 1964, the Tribunal, at the instance of the Revenue, has referred the following question of law to this Court for opinion:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in computing the chargeable profits for purposes of the Surtax Act, by excluding the interest received from the Indian branches of foreign banks as falling within Schedule to the Companies (Profits) Surtax Act, 1964 ?"

The assessee is a non-resident company which had not made the prescribed arrangements for the declaration and payment of dividends within India. During the previous years relevant to the asst. yrs. 1972-73, 1973-74 and 1974-75, the assessee received certain amounts by way of 'interest' from the First National City Bank and the Chartered Bank. The assessee claimed exclusion of the said amounts in computation of its "chargeable profits" under the Companies (Profits) Surtax Act, 1964. The claim of the assessee was rejected by the IAC who made the assessment. The assessee went in appeal before the CIT(A). The CIT(A) upheld the order of the IAC. On further appeal to the Tribunal, the Tribunal decided in favour of the assessee. It was held that the assessee was entitled to exclusion of the amounts received by it from the Indian branches of the two foreign banks in computation of its "chargeable profits" by virtue of cl. (x) of r. 1 of the First Schedule to the Surtax Act. Hence, this reference at the instance of the Revenue.

The controversy before us revolves round the interpretation of cl. (x) of r. 1 of the First Schedule to the Surtax Act. The facts of the case are not

in dispute. The assessee is a non-resident company which had not made the prescribed arrangements for the declaration and payment of dividends within India. During the assessment years under reference, the assessee received certain amounts by way of interest from the Indian branches of two foreign banks situated in India. Whether such interest falls within cl. (x) of r. 1 of the First Schedule to the Surtax Act, 1964 or not is the point at issue. Relevant portion of the First Schedule to the Surtax Act reads as under :

"THE FIRST SCHEDULE

[See s. 2(5)]

Rules for computing the chargeable profits

In computing the chargeable profits of a previous year, the total income computed for that year under the IT Act shall be adjusted as follows:

1. Income, profits and gains and other sums falling within the following clauses shall be excluded from such total income, namely :

xxx xxx xxx xxx

(x) in the case of a non-resident company which has not made the prescribed arrangements for the declaration and payment of dividends within India, its income by way of any interest or fees for rendering technical services received from Government or a local authority or any Indian concern:

xxx xxx xxx xxx"

A reading of the cl. (x) of r. 1 made it abundantly clear that in computing the chargeable profits of a non-resident company which has not made the prescribed arrangements for the declaration and payment of dividends within India, its income by way of :

(i) interest, or

(ii) fees for rendering technical services,

received from :

(a) Government, or

(b) a local authority, or

(c) any Indian concern

is to be excluded from its total income. The contention of the assessee is that the words "any interest" appearing in cl. (x) of r. 1 of the First Schedule to the Surtax Act stand by themselves and are not subject to the condition appearing thereafter viz., "received from Government or local authority or any Indian concern". According to the assessee, the above condition applies only to "fees for rendering technical services" and not to "interest". As a result, any interest received by the assessee falls in cl. (x) irrespective

of the source of the receipt. On the other hand, the contention of the Revenue is that the condition regarding the source of receipt is applicable to both types of incomes, i.e. "interest" and "fees".

We have carefully considered the rival submissions. We find it difficult to accept the contention of the assessee that the condition regarding source of receipt is not applicable to "interest". The expression "any" preceding the word "interest", in our opinion, is common to both "interest" and "fees". It is well-settled rule of interpretation that a statutory provision has to be read as a whole in the context in which it appears. Words, indicative of any exclusion or condition, in the absence of any intention to the contrary, have to be given full effect. If we read cl. (x) of r. 1 of the First Schedule as a whole, it is abundantly clear that it deals with two types of receipts—one, receipt by way of "any interest" and another, receipt by way of "fees for rendering technical services". The condition specified therein that such receipts should be from Government or a local authority or any Indian concern applies to both types of receipts. This qualifying phrase is not intended to qualify "fees" alone but applies equally to "interest" referred to in the said rule. The expression "any" applies to both "interest' and "fees" which means "any interest" or "any fees for rendering technical services". The condition in regard to source of receipt equally applies to incomes falling under both the heads. We are, therefore, of the clear opinion that interest received from a Government or a local authority or any Indian concern only can be excluded under cl. (x) of r.1.

The next question that falls for determination is whether the branch of a foreign bank situated in India can be said to be an "Indian concern". We had occasion to examine the true meaning of the expression "concern" in a recent decision in IT Ref. No. 98 of 1983 delivered on 13th July, 1993 *Dr. J.M. Mokashi vs. CIT* [Since reported at (1993) 115 CIT (Bom.) 73] wherein it was held :

> "...The word concern is a word of wide import and takes within its sweep and ambit all organisations or establishments, engaged in business or profession, whether owned by a company, partnership or any other entity."

We are to find out here the true meaning of the expression "Indian concern". The question is whether "every concern in India" can be held to be "Indian concern" for the purposes of cl. (x) of r. 1 of the First Schedule to Surtax Act or it must be a concern which is Indian in character. On a careful consideration, we are of the opinion that the word "Indian concern" means a concern which is Indian in character. A concern, which is not Indian, cannot be termed as "Indian concern" mereby by reason of its location in India. Just as a foreign citizen cannot be said to be an Indian citizen by reason of his residence in India, the branches of a foreign concern situated in India cannot be held to be "Indian concern". This view of ours gets full

support from the decision of the Madras High Court in *CIT vs. Craigmore Land & Produce Co. Ltd.* (1977) 110 ITR 730 (Mad.). In that case, the Madras High Court was also required to interpret the expression "Indian concern" used in the very same cl. (x) of r. 1 of the First Schedule to the Surtax Act. The facts of that case are also identical to the facts of the case before us. Controversy in that case was also in regard to the exclusion of the amount of interest received by the assessee from a branch of a foreign bank in India in computation of the chargeable profits for the purposes of Surtax Act. The question was whether the Indian branch of a foreign bank can be held to be an "Indian concern". The Tribunal held that the Indian branch of the Mercantile Bank Ltd., which was non-resident company incorporated outside India, was a unit by itself managed by a local manager who had sufficient powers to manage it and hence this unit which carried on business in India can be held to be an "Indian concern". On reference at the instance of the Revenue, the High Court reversed the finding of the Tribunal and held that the Mercantile Bank Ltd. being incorporated outside India and it being a non-resident company, its branch cannot be treated as an "Indian concern". It was observed :

> "...the expression used is "Indian concern "and not "concern in India". If the expression used is "a concern in India', it may be said that a mere geographical location in India or the situs of the concern in India is sufficient to bring the concern within the scope of the expression "Indian concern". On the other hand, the expression used is not "a concern in India", but "an Indian concern". This different expression derives significance from the fact that there are provisions in the IT Act where the statute uses the expression "industrial undertaking in India" and not "Indian industrial undertaking" [see s. 10(15)(iv)(b) of the IT Act, 1961]. *Consequently, we have to give a meaning to the expression, "Indian concern" as distinguished from "a concern in India"*. As we have pointed out already, if the expression is "a concern in India", irrespective of the ownership, management or control, the mere location or situation of the concern in the geographical area of India will be sufficient to make the concern fall within the scope of the expression. *On the other hand, the word "Indian" means "belonging or relating to India" or "of India"*. The expression "*of India*" *is indicative of a much stronger and firmer relationship with India than the expression "in India". Consequently, for the purpose of applying the provision in question, it is not enough if the concern is functioning or working in India, but the ownership, management and control of the concern must be substantially in India*. Admittedly, in this case, the Mercantile Bank Ltd. is incorporated outside India and it is a non-resident company. Hence, simply because it has got a branch in India, that branch cannot be termed to be an Indian concern."

[Emphasis, italicised]

The learned counsel for the assessee referred to cl. (viii) of r. 1 wherein the words "Indian company" have been used to show that wherever the legislature intended to confine the expression to "Indian company", it had specifically used the expression "Indian company". The submission of the learned counsel, in other words, is that the "Indian concern" in this context has to be read as "concern in India". We do not find any force in the above submission of the learned counsel for the assessee. The expression "Indian company" has been defined in s. 2(26) of the IT Act, 1961 to mean "a company formed and registered under the Companies Act, 1956 (1 of 1956)". The above definition clearly goes to show that the legislature by the use of the expression "Indian company" really intended to mean "companies which are registered in India" and not "companies which are carrying on business in India". If we take the analogy of the above definition of "Indian company" into consideration, the expression "Indian concern" will also mean a "concern'—Indian in character.

In that view of the matter, we are of the opinion that the interest received by the assessee from the branches of the two foreign banks located in India cannot be deducted under cl. (x) of r. 1 of the First Schedule to the Surtax Act.

In that view of the matter, we answer the question in the negative, i.e., in favour of the Revenue.

Before parting with the case, we deem it necessary to deal with one more contention of the assessee that the Tribunal having not given any decision on the interpretation of the expression "Indian concern" appearing in cl. (x) of r. 1, this Court should not decide this point itself but remand the matter to the Tribunal with a direction to it to decide the matter afresh. We have considered the above submission of the learned counsel for the assessee. We, however, do not find any merit in it. The question of law in issue between the parties in this case is whether the interest received by the assessee from the Indian branches of foreign banks could be excluded in computing the chargeable profits for the purpose of surtax under cl. (x) of r. 1 of the First Schedule. The answer to this question depends on interpretation of cl. (x) of r. 1. Whether the branches of foreign banks situated in India can be said to be an "Indian concern" or not is one of the essential aspects of the question which was also urged before the Tribunal. Once such broad question is referred, the High Court is not required to limit itself only to the particular aspect on which decision was given by the Tribunal. It is well-settled that once a question has been referred to the High Court, there is no limitation that the reference should be limited to those aspects of the question which were argued before the Tribunal or decided by the Tribunal. All aspects may be argued and considered where the question involves more than one aspect. As observed by the Supreme Court in *CIT vs. Scindia Steam Navigation Co. Ltd.* (1961) 42 ITR 589

(SC) a question of law might be simple one having its impact at one point or it may be complex one, trenching over an area with the approaches leading to different points therein. Such a question might involve more than one aspect, required to be tackled from different stand-points. It will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of s. 256 of the Act. Once such a question is referred, it is open to the High Court to consider all aspects thereof. Reference may also be made to the decision of the Supreme Court in *Indore Malwa United Mills Ltd. vs. CIT* (1966) 59 ITR 738 (SC). In this case, the question of law in issue between the parties and referred to the High Court was the broad question whether or not the assessee was liable to pay tax on the ground that the sale proceeds including the profits of the sale were received by the assessee in British India, the Supreme Court held that in such a case the revenue authorities might be permitted to urge for the first time at the hearing of the reference that, on the facts found by the Tribunal, the post office was the agent of the assessee for the purpose of receiving the cheques representing the sale proceedings and the assessee received the sale proceeds in British India where the cheques were posted though, this aspect of the question was not argued before the Tribunal and that the only point argued there was that the sale proceeds were received at Bombay where the cheques were encashed. The Supreme Court held that the question referred was not narrow one so as to exclude consideration of the contention that the assessee received the sale proceeds through its agent, the post office in British India. It was, therefore, held that the Revenue authorities can raise this contention for the first time in the High Court. In the instant case, the true meaning of the expression "Indian concern" was specifically urged before the Tribunal and it is an important aspect of the question referred to this Court. We have, therefore, no hesitation in holding that such an aspect can be gone into and decided by the High Court even if it had been decided upon by the Tribunal.

Accordingly, this reference is answered in favour of the Revenue. No order as to costs.

(1995) 126 Taxation 142 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta & Hon'ble Mr. Justice Shyamal Kumar Sen)

IT Reference No. 155 of 1991

Commissioner of Income-tax

vs.

Walter Bushnell (P) Ltd.

Decided on : 21-4-1994

DEDUCTIONS — Assessee claiming to have set up new industrial

undertaking — Assessee claiming the new unit set up with altogether new building and fresh capital investments — Also claiming number of chemists and workmen employed in the unit — Claim of the assessee rejected on the ground that in the balance sheet no bifurcation to show which plant and machineries installed for new unit — CIT(A) holding re-construction of existing business — Claim accepted by Tribunal and finding recorded about installation of new machinery — Held, the findings arrived by the Tribunal not controverted — Tribunal rightly allowing claim of the assessee.

Income-tax Act, 1961 — Section 80J.

FACTS

This reference relates to the income-tax assessments of the assessee company for the two previous years corresponding to the A.Ys. 1981-82 and 1982-83. The assessee company claimed deduction u/s 80J of the Act in respect of its new unit at Konnagar which was set up for the manufacture of pharmaceutical formulations like Tetracycline Capsules, Doxycycline Capsules, Chloramphenical Capsules and Ampicillin Capsules. The ITO did not allow the claim of the assessee company on the alleged ground that the assessee has not been able to prove that it had introduced fresh capital in its new unit, that the new unit yielded additional profit arising from manufacture and/or production of new articles, that requisite labour force was employed in the new unit and that the new unit was separate and distinct from its existing industrial unit. It was submitted that the new industrial unit at Konnagar was set up in an altogether new building which was constructed for this purpose in the year 1977 and this unit was separate and distinct from the existing unit engaged in the manufacture of aspirin, details of plant and machineries installed in the new unit engaged in the manufacture of pharmaceutical products were also furnished before the CIT(A). The CIT(A), however, observed that in the balance sheet, there was no bifurcation to show which plant and machineries were installed. The CIT(A) held and observed that the new unit was nothing but a case of reconstruction of its existing business. The Tribunal upheld the claim of the assessee company and observed that the CIT(A) was not justified in rejecting the claim of the assessee for deduction u/s 80J.

DECISION

The Hon'ble Court found that the Tribunal had allowed the assessee's claim for deduction u/s 80J based upon certain findings of fact, none of which were under challenge before them in this reference. The Tribunal had clearly found that the assessee had set up a new industrial unit for manufacture of pharmaceutical products and that new plant and machineries were installed in his new unit which was engaged in the manufacture of

Tetracycline Capsules, Doxycycline Capsules, Chloramphenical Capsules and Ampicillin Capsules. These are all findings of fact recorded by the Tribunal. These facts constitute the condition precedent which should entitle the assessee to the benefit of section 80J. In view of this, the Hon'ble Court found that there was no merit in the revenue's reference in this case. The Hon'ble Court, therefore, answered both the questions referred by the Tribunal at the instance of the revenue in this case in the affirmative and in favour of the assessee.

Full text of the Judgment is given below :

JUDGMENT

(Ajit K. Sengupta, J.)

In this reference made at the instance of the revenue, the Tribunal has referred the following questions for the opinion of this Court under section 256(2) of the Income-tax Act, 1961 ('the Act'):

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that the assessee is entitled to the deduction under section 80J of the Income-tax Act, 1961 ?

2. Whether, the decision of the Tribunal that the assessee is entitled to the deduction under section 80J is based on the materials available before the Assessing Officer and the Commissioner (Appeals)?"

This reference relates to the income-tax assessments of the assessee-company for the two previous years corresponding to the assessment years 1981-82 and 1982-83. The assessee-company claimed deduction under section 80J of the Act in respect of its new unit at Konnagar which was set up for the manufacture of pharmaceutical formulations like Tetracycline Capsules, Doxycycline Capsules, Chloramphenical Capsules and Ampicillin Capsules. The ITO did not allow the claim of the assessee-company on the alleged ground that the assessee has not been able to prove that it had introduced fresh capital in its new unit, that the new unit yielded additional profit arising from manufacture and/or production of new articles, that requisite labour force was employed in the new unit and that the new unit was separate and distinct from its existing industrial unit.

On appeal before the Commissioner (Appeals) it was, *inter alia*, submitted on behalf of the assessee-company that it had invested fresh capital of Rs. 10 lakhs by issuing new 1 lakh equity shares of Rs. 10 each. It was also submitted that new products like Deltron, Fervit, Amolox, Symasal, Cloxacillin Capsules and Metakelfic tablets are produced in the new industrial undertaking. As regards the employment of labour, it was submitted that four chemists and a number of workmen were employed in the new industrial undertaking which started production in 1978 in terms of new licence obtained in 1977. It was also explained that the assessee-company had

two units, one of which manufactured aspiring and the other new unit was engaged in manufacturing pharmaceutical products. It was also submitted that the new industrial unit at Konnagar was set up in an altogether new building which was constructed for this purpose in the year 1977 and this unit was separate and distinct from the existing unit engaged in the manufacture of aspirin; details of plant and machineries installed in the new unit engaged in the manufacture of pharmaceutical products were also furnished before the Commissioner (Appeals). It was explained that the value of plant and machinery installed in the new unit in different years was as under :

		Rs.
1977	:	1,03,400
1978	:	1,03,986
1979	:	54,040

The Commissioner (Appeals), however, observed that in the balance sheet, there was no bifurcation to show which plant and machineries were installed in the old unit manufacturing aspirin and which new plant and machineries were installed in the new unit engaged in the manufacture of pharmaceutical products. The Commissioner (Appeals) also referred to the notes forming part of the balance sheet of the assessee-company drawn as at 31-12-1977 which shows that the assessee-company purchased the factory land and building from its sister concern, Martin & Harris (P.) Ltd. The value of plant and machinery purchased from its said sister concern was to the tune of Rs. 2,95,500. The Commissioner (Appeals), therefore, held and observed that the new unit was nothing but a case of reconstruction of its existing business. Since, the cost of the newly constructed building as appearing in the balance sheet of the assessee-company drawn as at 31-12-1978 was Rs. 36,107, the Commissioner (Appeals) felt that the new plant and machineries must have been installed in the old premises. He, therefore, observed that the assessee-company has failed to show that it had set up a new unit which was separate and distinct from its old unit. The Commissioner (Appeals), therefore, rejected the case of the assessee-company.

On further appeal before the Tribunal, it was explained on behalf of the assessee-company that in terms of an agreement dated 22-9-1976, the assessee-company had agreed to purchase the factory land and building for Rs. 4,25,000 and plant and machinery, furniture and fittings for Rs. 3 lakhs from its sister concern, Martin & Harris (P.) Ltd. This factory was engaged in the manufacture of aspirin; but for the manufacture of pharmaceutical products, the assessee-company had set up a separate factory in terms of licence dated 6-10-1977. This new factory was engaged in the manufacture of Tetracycline Capsules, Doxycycline Capsules, Chloramphenical Capsules and Ampicillin Capsules. The assessee also referred to the Tribunal's earlier decision in the assessee's own case for the assessment

year 1979-80, wherein the Tribunal while dealing with the disallowance of advertisement expenditure under section 37(3A) of the Act had given a specific finding to the effect that the assessee's new industrial undertaking at Konnagar began to manufacture new pharmaceutical products like tablets, capsules and injections from the accounting year 1978. The Tribunal, therefore, held that the assessee's case fell under section 37(3D) and the ceiling in respect of expenditure as laid down in section 37(3A) was not applicable. The assessee also referred to its printed annual report on its accounts for the year 1978. In its annual report, the directors of the assessee-company had stated that the manufacture of pharmaceutical formulations had been successfully introduced in this year and the assessee-company was able to achieve a total turnover of Rs. 1,01,38,662 as compared to the earlier turnover of Rs. 9,39,816. It was also explained before the Tribunal on behalf of the assessee-company that the bifurcation of plant and machinery with reference to different units was not required to be disclosed on the face of the balance sheet since there was no such statutory requirement under the Companies Act, 1956. However, complete break-up of plant and machineries installed by the assessee-company in its different units, viz, the one already engaged in the manufacture of aspirin and the new unit engaged in the manufacture of pharmaceutical formulations, was clearly available from the books of account of the assessee-company and such details were duly furnished before the Commissioner (Appeals). It was also submitted that the Commissioner (Appeals) was confused when he made reference to plant and machineries installed in the aspirin unit, whereas the assessee-company was referring to new plant and machineries installed in the manufacture of pharmaceutical formulations. From the details filed by the assessee-company as to the names of the suppliers and the supply bill numbers it was clear that the plant and machineries installed in the new unit for manufacture of pharmaceutical products were purchased from various persons. The machineries purchased from Martin & Harris (P.) Ltd. was for the manufacture of aspirin and not for the manufacture of pharmaceutical formulations, which is the only business carried on by the new unit. The Tribunal also found that the facts on record clearly showed that the new unit of the assessee was engaged in the manufacture or production of pharmaceutical formulations like tablets, capsules and injections. The machineries purchased by the assessee-company from its sister concern, Martin & Harris (P.) Ltd. in terms of an agreement dated 22-9-1976 were in respect of the other unit already engaged in the manufacture of aspirin. The Tribunal also found that the assessee purchased new machineries from various persons for the manufacture of pharmaceutical formulations and the machineries purchased from Martin & Harris (P.) Ltd. had nothing to do with the machineries purchased from others for manufacturing of pharmaceutical formulations. The Tribunal also noted that the Commissioner (Appeals) was clearly confused while referring to the machineries purchased by the assessee-company from Martin & Harris (P.)

Ltd. inasmuch as these machineries were purchased for aspirin unit and not for the purchase of manufacturing pharmaceutical formulations like Tetracycline Capsules, Doxycycline Capsules, Chloramphenical Capsules and Ampicillin Capsules. In this view of the matter, the Tribunal upheld the claim of the assessee-company and observed that the Commissioner (Appeals) was not justified in rejecting the assessee-company's claim for deduction under section 80J.

We find that the Tribunal has allowed the assessee's claim for deduction under section 80J based upon certain findings of fact, none of which is under challenge before us in this reference. The Tribunal has clearly found that the assessee had set up a new industrial unit for manufacture of pharmaceutical products and that new plant and machineries were installed in this new unit which was engaged in the manufacture of Tetracycline Capsules, Doxycycline Capsules, Chloramphenical Capsules and Ampicillin Capsules.

These are all findings of fact recorded by the Tribunal. These facts constitute the conditions precedent which should entitle the assessee to the benefit of section 80J. In view of this, we find that there is no merit in the revenue's reference in this case. We, therefore, answer both the questions referred by the Tribunal at the instance of the revenue in this case in the affirmative and in favour of the assessee.

There will be no order as to costs.

Shyamal K. Sen, J. — I agree.

(1995) 126 Taxation 147 (Del.)

IN THE HIGH COURT OF DELHI

(Before Hon'ble Mr. Justice D.P. Wadhwa & Hon'ble Mr. Justice M.K. Sharma)

I.T.C. No. 19 of 1993

Commissioner of Income-tax

vs.

M/s J.K. Synthetics Ltd.

For the Appellant	:	**Rajendra with R.N. Verma**
For the Respondent	:	**P.N. Monga & Manju Monga**
Decided on	:	10-3-1995

REFERENCE — Tribunal holding additional liability of excise duty allowable — Also holding assessee entitled to weighted deduction of expenditure on postage, inspection charges and commission paid in India — Tribunal holding an amount of Rs. 1,35,523/- spent on building to be revenue expenditure — Also allowing provisions for excise duty — Revenue's application u/s 256(1)

rejected — Held, only questions of law regarding weighted deduction on expenses incurred in India on postage and inspection and also expenses on building whether revenue or capital to be referred.

Income-tax Act, 1961 — Section 256(2).

FACTS

In the present case, the Tribunal had allowed various claims of the assessee, namely, additional liability on account of excise duty holding that the excise duty pertains to assessee's production of the current year, weighted deduction u/s 35B on expenditure of postage, inspection charges and commission paid, commission paid to M/s Hindustan Fabric Corporation, expenses of Rs. 1,35,523/- spent on building holding the same to be revenue expenditure and a provision of Rs. 1,29,923/- on account of excise duty. The revenue sought reference which was refused by the Tribunal. Being aggrieved, the revenue sought directions to the Tribunal to refer these questions.

DECISION

The Hon'ble Court held that as far as the question of allowing additional excise duty, allowing exemption to M/s Hindustan Fabric Corporation and in holding that provisions of additional excise duty were allowable, were questions of fact only. The only point that could arise for consideration was if the Tribunal was right in allowing weighted deduction u/s 35B on expenditure on postage, inspection charges and commission paid in India and also whether the amount of Rs. 1,35,523/- spent on building was revenue or capital expenditure. The Hon'ble Court, therefore, directed the Tribunal to refer these two questions for their opinion. The application was partly allowed in favour of the revenue.

Cases referred to :

1. *CIT vs. J.K. Synthetics Ltd.* (1990) Taxation 96(3) 171 (Del.); 181 ITR 505 (Del.)
2. *CIT vs. J.K. Synthetics Ltd.* (1990) Taxation 96(3) 259 (Del.); 181 ITR 537 (Del.)
3. *CIT vs. J.K. Synthetics Ltd.* (1990) Taxation 96(3) 141; 182 ITR 125 (Del.)
4. *CIT vs. Jay Engineering Works Ltd.* (1988) Taxation 88(3) 130 ; 174 ITR 133 (Del.)
5. *Kedar Nath Jute Mfg. Co. Ltd. vs. CIT* 82 ITR 363 (SC)
6. *CIT vs. J.K. Synthetics Ltd.* 134 ITR 1988 (Del.)

Full text of the Judgment is given below :

JUDGMENT

(Dr. M.K. Sharma, J.)

By this application filed under section 256 (2) of the I.T. Act, 1961

(hereinafter referred to as the Act), the Revenue seeks to have the following questions stated to be questions of law, referred to this Court, for its opinion:-

1. Whether the Tribunal was right in law in holding that the additional liability on account of excise duty amounting to Rs. 7,78,667/- and Rs. 12,51,125/- was allotable on the ground that these liabilities of additional excise duty pertain to assessee's production of the current year ?
2. Whether the Tribunal was right in law on facts in holding that the assessee was entitled to weighted deduction u/s 35B on expenditure on postage, inspection charges and commission paid in India ?
3. Whether the Tribunal was right in law on facts and in circumstances in holding that the assessee was entitled to allowance of Commission paid to M/s. Hindustan Fabric Corporation to the tune of Rs. 84,931/- ?
4. Whether the Tribunal was right in law on facts and in circumstances in holding that the amount of Rs. 1,35,523/- spent on building was revenue expenditure ?
5. Whether the Tribunal was right in law on facts in holding that addl. excise duty provision amounting to Rs. 1,29,923/- was allowable to the assessee on the ground that these liabilities pertain to the assessee's production of the current year ?

So far as question Nos. 1 and 5 are concerned they are similar in nature and dependant on each other and therefore, we take up the said two questions together for the purpose of our consideration. We find that the conclusion reached by the Tribunal while discussing the issues raised in the said questions are settled by the law laid down by the Supreme Court in *Kedar Nath Jute Manufacturing Co. Ltd.* reported in 82 ITR 363 (SC) and therefore, no question of law could still be said to arise out of the order of the Tribunal for reference to this Court. We also find that the said questions are purely questions of fact and therefore, we do not consider that the said two questions be called for our opinion.

So far as question No. 3 is concerned we find, that findings arrived at by the Income-tax Tribunal on the said issue is on appraisal of facts and evidence and accordingly, in our opinion, no question of law arises therefrom and we decline to call for a reference on this question as well. However, considering the contents of question No. 2, we find that so far as it relates to allowing weighted deduction under Section 35B on expenditure on commission on exports paid in India, we find that the same gives rise to a question of law and accordingly, we direct the Tribunal to refer to this court the said question for our opinion. The rest of the question as formulated by the Revenue is considered to be not a question of law and accordingly, we decline to call for a reference of the same.

Accordingly, the statement on the said question in the following manner may be referred to -

"Whether the Tribunal was right in law in holding, that the assessee was entitled to weighted deduction under Section 35B, on expenditure on commission on exports paid in India ?"

So far as question No. 4 is concerned we have given our anxious consideration to the arguments advanced by the counsel for the rival parties and on appreciation thereof we are of the opinion that the said question gives rise to a qustion of law and accordingly we direct the Tribunal to refer the said question also for the opinion of this court.

In the result, we direct the Tribunal to state the case and refer the question No. 2 as reframed and question No. 4 to this court for its opinion. There will be no order as to costs.

(1995) 126 Taxation 150 (Ker.)

IN THE HIGH COURT OF KERALA

(Before Hon'ble Mr. Justice T.L. Viswanatha Iyer, J.)

O.P. No. 10611 of 1990

Mahamood Ibrahim Sait

vs.

Income-tax Officer

For the Appellant : **P.G.K. Wariyar**
For the Respondent : **N.R.K. Nair**
Decided on : 24-5-1994

CAPITAL GAINS — Assessee holding property mortgaged to bank against loans — Property sold with prior permission of bank for Rs. 10.34 lakhs — Out of sale consideration as per agreement Rs. 9 lakhs paid to bank — Assessee claiming capital gain to be computed only on Rs. 1.34 lakhs — Amount paid to bank to be reduced — Held, amount spent for discharge on mortgage not liable to be deducted in computation of capital gains.

Income-tax Act, 1961 — Section 48.

FACTS

The petitioners in these two writ petitions jointly owned 149.604 cents of land in Sy. Nos. 72 and 1583 of Mattancherry Village, which they had mortgaged, along with others to the Canara Bank, Mattancherry Branch, by deposit of title deeds, to secure the advances made and to be made by the bank to the aforesaid company. The petitioners entered into an agreement to sell the property to ten persons under different assignment deeds, for a total consideration of Rs. 10,33,966/-. The bank agreed to release the mortgage on the condition that if an amount of

Rs. 9 lakhs was paid towards the outstandings. The deeds of assignment were thereafter executed and the property sold in accordance with the agreement to sell. The returns were accepted and the assessments completed u/s 143(1) of the Act. Petitioners then had second thoughts about the correctness of their returns, and they challenged the orders of assessment in revision. The ground taken was that the consideration for the transfers should be taken as the amount of Rs. 10,33,966/- less Rs. 9 lakhs paid to the bank.

DECISION

The Hon'ble Court held that the matter was really covered by the decision of Balakrishna Eradi & Kochu Thommen, JJ in *Ambat Echukutty Menon's* case. The property was acquired under the Land Acquisition Act and in the computation of the capital gains arising therefrom, the assessee, an heir of P, claimed that the amount spent for discharging the mortgage liability should be deducted. The Hon'ble Court, therefore, held in concurrence with *Ambat Echukutty Menon's* case that the amount spent for discharge of the mortgage is not liable to be deducted in the computation of the capital gains u/s 48. The writ petitions were dismissed as bereft of any merit.

Cases referred to :

1. *Ambat Echukutty Menon vs. CIT* (1978) 111 ITR 880 (Ker.)
2. *CIT vs. Daksha Ramanlal* (1992) 197 ITR 123 (Guj.)
3. *Smt. S. Valliammai vs. CIT* (1981) Taxation 62(3) 34 (Mad.), (1981) 127 ITR 713 (Mad.)
4. *Miss Dhun Dadabhoy Kapadia vs. CIT* (1967) 63 ITR 651 (SC)

Full text of the Judgment is given below :

JUDGMENT

The petitioners in these two writ petitions are brothers. They were the Directors of a company Indo Marine Agencies (K) P. Ltd. They jointly owned 149.604 cents of land in Sy. Nos. 72 and 1583 of Mattancherry Village, which they had mortgaged, along with others, to the Canara Bank, Mattancherry Branch, by deposit of title deeds, to secure the advances made and to be made by the Bank to the aforesaid company. More than Rs. 60 lakhs was due to the bank under the mortgage, at a time when the petitioners entered into an agreement to sell the property to ten persons, under different assignment deeds, for a total consideration of Rs. 10,33,966. The bank agreed to release the mortgage on the property, if an amount of Rs. 9 lakhs was paid towards the outstandings. The amount was, accordingly, deposited by the petitioners on 21-6-1985 through the purchasers, or with funds made available by them, and the bank released their mortgage right on the property. The deeds of assignment were thereafter executed and the property sold in accordance with the agreement to sell.

Petitioners filed returns for purposes of assessment under the Income-tax Act, 1961 ('the Act') disclosing the capital gains arising out of the transfers as on a total consideration of Rs. 10,33,966. The returns were accepted and the assessments completed under section 143(1) of the Act by orders dated 27-12-1988 marked Ext. P4 in each of the cases. Petitioners then had second thoughts about the correctness of their returns, and they challenged the orders of assessment in revision Ext. P5 dated 8-8-1989 before the Commissioner, the second respondent. The ground taken was that the consideration for the transfers should be taken as the amount of Rs. 10,33,966 less Rs. 9 lakhs paid to the bank in discharge of the mortgage, in which event, there was no capital gain liable to be assessed. At the hearing, the argument appears to have been that the amount paid to the bank did not reach the petitioners as it has been diverted by overriding title and, therefore, capital gains, if any, should be computed only with reference to the balance. The Commissioner over-ruled this plea stating that there was no requirement in law that the seller should directly receive the consideration. When the amount was paid to the bank in discharge of the mortgage, it was appropriation of the sale proceeds for the petitioner's benefit. He held further that the mortgage debt was not an admissible deduction in computing capital gains as per the decision of this Court in *Ambat Echukutty Menon vs. CIT* (1978) 111 ITR 880. The Commissioner, accordingly, dismissed the revision petitions by the order Ext. P6 which is under challenge in these writ petitions.

The contention of counsel for the petitioners is a very ambitious one. He states that what is transferred is only the equity of redemption for which the consideration is Rs. 10,33,966 *minus* Rs. 9 lakhs, *i.e.*, Rs. 1,33,966. According to him, the full value of the consideration for the purpose of section 48(1)(a) is only that which is actually received by the vendors, there being a diversion at source of the amount paid for discharging the mortgage. It is, therefore, contended that the consideration is only that amount that is left after the discharge of the mortgage. According to the counsel, *Ambat Echukutty Menon's* case (supra), has been decided erroneously.

Section 45 brings to tax under the head 'Capital gains' any profits or gains arising from the transfer of a capital asset effected in the previous year. It is deemed to be the income of the previous year in which the transfer took place. Section 48 of the Act prescribes the mode of computation of capital gains and the deductions to be made therefrom. The income under the head 'Capital gains' is computed by deducting from the full value of the consideration received, or accruing, as a result of the transfer, the cost of acquisition of the asset and the cost of any improvement thereto, among others. Cost of improvement, so far as is relevant to this case, is defined in section 55(1)(b)(2)(ii) of the Act as meaning all expenditure of a capital nature incurred in making any additions or alterations to the capital asset by the assessee after it became his property. The questions for consideration

are: what is the full value of the consideration received, or accruing, to the petitioners, as to whether the mortgage liability of Rs. 9 lakhs is not liable to be treated as part thereof, and in any event, whether it could be deducted from the consideration, as an improvement for purpose of computing the capital gains.

These questions need not really pose any difficulty so far as this case is concerned for the reason that the ultimate transfers were not of the equity of redemption simpliciter as contended by the petitioners, but of the full right in the property *without any encumbrance thereon.* This is because the mortgage was discharged by payment of Rs. 9 lakhs and it was only thereafter, that the sale deeds were executed by the petitioners. On the date of the sales, the mortgage had been extinguished and what the petitioners transferred was the full right in the property sans any mortgage. No doubt, the petitioners state that the payment of Rs. 9 lakhs was made through the purchasers or with their assistance. But this is irrelevant as the payment was made in discharge of the dues of the petitioners and the receipts were made out in their names. It was a payment made by them. The mortgage was not kept alive by any subrogation in favour of the purchasers. The sale was, therefore, of the property as such without any encumbrance, that is, not of the bare equity of redemption, but of the full right therein. The consideration received was, therefore, for the property as a whole and not merely for the equity of redemption. Petitioner's case has to fail on this ground itself, though I do not find any substance even otherwise in the contentions raised and argued.

The subject-matter of the transfer was the right, title and interest of the petitioners in the property. The consideration for the transfer was Rs. 10,33,966 which was discharged partly by payment in cash (Rs. 1,33,966) and partly by payment to the Bank (Rs. 9 lakhs). The sale would not have taken place on payment of Rs. 1,33,966 without payment or without arrangement for payment of another Rs. 9 lakhs to the Bank as that alone will discharge the petitioners of their liability under the mortgage. The bargain between the parties was for the sale deed being executed on the amount of Rs. 10,33,966 being satisfying to the petitioners and not otherwise. The fact that part of the amount went in discharge of the mortgage is irrelevant as the sale would not have taken place without that payment. The consideration for transfer of a property subject to a mortgage has never been understood as the balance remaining after deduction of the mortgage amount, whether it be with reference to the Stamp Act, the laws relating to transfer of property, registration or otherwise. Whether the mortgage is discharged by payment before the sale, or whether the amount is reserved with the vendee for payment to the mortgagee, the fact remains that it is the money of the vendor already paid or due that is utilised for the purpose. And it is the vendor's liability that is discharged. The amount paid for discharging the mortgage is, thus, part of the consideration for

the vendor parting with his rights in the property.

The consideration for the sale by the petitioners was Rs. 10,33,966 and not this amount reduced by Rs. 9 lakhs.

There is no diversion of any amount at source or by overriding title as contended, as the amount of Rs. 9 lakhs had actually reached the petitioners and gone in discharge of their dues. I do not think this contention requires any serious consideration.

The further question is whether the amount spent for discharge of the mortgage could be deducted as cost of acquisition of the asset or as cost of any improvement to it, in the computation of the capital gains, under section 48(1)(a)(ii) read with section 55. The mortgage in question was created by the petitioners and not by any of their predecessors. Discharge of such a mortgage created by the petitioners themselves cannot obviously be part of the cost of acquisition, the mortgage being a post-acquisition one, nor for that matter could it be treated as cost of any improvement to the property. It is just the wiping off of a liability which the petitioners themselves had created on the property.

The matter is really covered by the decision of Balakrishna Eradi & Kochu Thommen, JJ, in *Ambat Echukutty Menon's* case (supra). In that case, one was the owner of a property over which he created a mortgage. After his death, his heirs discharged the mortgage. The property was acquired under the Land Acquisition Act and in the computation of the capital gains arising therefrom, the assessee, an heir of P, claimed that the amount spent for discharging the mortgage liability should be deducted either as part of cost of acquisition of the asset or as cost of improvement thereto. The Bench negatived the contention for reasons which have been succinctly summarised in the headnote which shall extract :

> "As the capital asset had become the property of the assessee by succession or inheritance on the death of P, who had acquired the property in December 1953, under section 49(1) of the Income-tax Act, 1961 the cost of acquisition of the asset is to be deemed to be the cost for which the previous owner P acquired it, as increased by the cost of any improvement of the asset incurred or borne either by the previous owner or the assessee. The original cost of the property was Rs. 49,920. Having regard to the definition of 'cost of improvement' contained in section 55(1)(b), in order to entitle the assessee to claim a deduction in respect of the cost of any improvement, the expenditure should have been incurred in making any additions or alterations to the capital asset that was originally acquired by the previous owner. Whether the previous owner had mortgaged the property and the assessee and his co-owners cleared off the mortgage so created, it could not be said that they incurred any expenditure by way of effecting any

improvement to the capital asset that was originally purchased by the previous owner."

I am in agreement with this view, besides its being binding on me. I am, therefore, unable to follow the decision of the Gujarat High Court in *CIT vs. Daksha Ramanlal* (1992) 197 ITR 123, pressed for acceptance by counsel for the petitioners, in which the question posed for consideration was whether the amount paid by the successors for discharge of a mortgage created by their predecessor was part of the cost of acquisition. The Gujarat High Court answered the question in the affirmative, dissenting from the view taken by this court in *Ambat Echukutty Menon's* case (supra) and by a Full Bench of the Madras High Court in *Smt. S. Valliammai vs. CIT* (1981) 127 ITR 713. In *Smt. S. Valliamai's* case (supra) the claim was for deduction of the estate duty paid by the assessee on the death of the original owner, in the computation of the capital gains. Since non-payment of the estate duty did not result in the assessee getting an imperfect or incomplete title, the Full Bench ruled that the estate duty paid was not deductible either as cost of requisition or as cost of improvement to the asset.

The counsel for the petitioners laid great stress on a decision of the Supreme Court in *Miss Dhun Dadabhoy Kapadia vs. CIT* (1967) 63 ITR 651, though I do not find any applicability of it to the facts of this case. The assessee in that case relinquished her right to acquire certain right shares in a company of which she was a shareholder, and made a capital gain of Rs. 45,262.50 in the process. She sought deduction from this amount, of the capital loss suffered by her by the diminution in value of her shares by reason of the enlarged shareholding consequent on the new issue. This was accepted and the capital loss was directed to be deducted from the capital gains. As I stated earlier, this decision holds no analogy for the case on hand.

I, therefore, hold in concurrence with *Ambat Echukutty Menon's* case (supra) that the amount spent for discharge of the mortgage is not liable to be deducted in the computation of the capital gains under section 48.

For the above reasons, the Commissioner was right in passing the order Ext. P6. The writ petitions are bereft of any merit. They are dismissed. There will be no order as to costs.

(1995) 126 Taxation 156 (MP)

IN THE HIGH COURT OF MADHYA PRADESH

(Before Hon'ble Justice Mr. A.R. Tiwari)

Misc. Petition No. 36/1986

M/s Parijat Chemicals Pvt. Ltd.

vs.

Income-tax Officer and Others

For the Appellant	:	**M.S. Chaudhary**
For the Respondent	:	**P.M. Chaudhary**
Decided on	:	14-2-1995

CONDONATION OF DELAY — Assessee filing returns showing losses — Assessment completed ex-parte on incomes — No application u/s 146 filed — CIT(A) deciding appeals in limine as time barred — Assessee approaching CIT for revision — Revision application late by four months — Revision petitions dismissed as barred by limitation — Order challenged in writ — Held, the decision of CIT in not considering the prayer for condonation of delay — Liberal approach in the matter of condonation of delay to be taken — Matter send back to CIT for decision on merits.

Income-tax Act, 1961 — Section 264.

FACTS

Assessee is a private limited company which filed its return for the A.Ys. 1978-79 and 1980-81 showing loss of Rs. 1,74,610/- and Rs. 2,29,947 respectively. The assessment werre completed ex-parte on an income of Rs. 3 lakhs and Rs. 5 lakhs respectively. The assessee did not file any application u/s 146 but preferred appeals. The CIT(A) dismissed the appeals as time barred. The application for condonation of delay was also rejected. The assessee filed petitions u/s 264 which were again late by nearly four months. the assessee also applied for condonation of delay before the CIT. The CIT rejected the application of the assessee as time barred. Being aggrieved, the assessee has filed the present writ.

DECISION

The Hon'ble Court held that the CIT had discretion for condonation of delay which has not been properly exercised. The Hon'ble Court further held that in view of the judgment in the case of *Collector Land Acquisition vs. Mst. Katiji and Others* (AIR 1987 SC 1353) a liberal approach is required in the matter of condonation of delay. In view of this, the matter was restored to the CIT to be decided on merits.

Case referred to :

Collector of Land Acquisition vs. Mst. Katiji and Others (AIR 1987 SC 1353)

Full text of the Judgment is given below :

JUDGMENT

This is a petition under Article 226/227 of the Constitution of India.

Briefly stated, the facts of the case are that the petitioner is a private limited company incorporated and registered under the Companies Act. Dr. V.V. Devsthale is its Director. The petitioner carries on the business of manufacture of fine aromatic chemicals, perfumery, compounds, drugs, intermediates etc. and also of taking over as a going concern the partnership business carried on under the name and style of M/s Sunita Aromatics, Indore. The firm was assessed to income-tax for the first assessment year i.e. 1974-75. The firm obtained the registration under the relevant provisions of the Income-tax Act. Various assessment orders were passed. The petitioner filed returns showing losses at Rs. 1,74,510/- and Rs. 2,29,947/- for the assessment years 1978-79 and 1980-81 respectively. For non-compliance of the notices under Sec. 143(2), the ITO completed the assessment *ex parte* determining the total income at Rs. 3 lakhs and 5 lakhs respectively. It appears that the petitioner did not file any application u/s 146 against the assessment order passed by the ITO. The petitioner preferred appeals against these assessment orders on 10-1-1984 before the CIT(Appeals-I), Indore. These two appeals were dismissed by the CIT (Appeals) in limine on 3-3-1984 as time barred. An application of the petitioner for condonation of delay in submitting the appeals for these two years was also rejected by the CIT (Appeals). The present petitions under Sec. 264 have been filed on 27th July, 1984 and are thus late by nearly four months. The petitioner filed an application dated 21-2-1985 and a written submission dated 5-3-1985. Aggrieved by the order passed by Respondent No. 4 (Commissioner of Income-tax, Bhopal) under Section 264 of the Income-tax Act, 1961 (Annexure P/23), the petitioner has filed this writ petition.

The Respondents have filed the return in opposition.

I have heard both the sides.

As urged by the counsel for the petitioner, it is not necessary for me to examine the validity of the orders or the merits of the matter. He limited this petition to the grievance of improper rejection of the application seeking condonation of delay in submission of the case under Section 264 of the Income-tax Act, 1961.

The application under Section 264 of the Act was filed on 27-7-1984 and was barred by nearly four months as the order of CIT (Appeals) was passed on 3-3-1984.

The counsel for the respondents submitted that if the order disposing the application seeking condonation of delay is demolished, then the alter may be left to the discretion of the authority for reconsideration of the application afresh and that the respondents may be left free to object to the prayer of condonation of delay.

In AIR 1987 SC 1353 *(Collector Land Acquisition vs. Mst. Katiji and others)*, it is held that the Court should adopt the liberal approach in matter of condonation of delay.

In view of the submissions of both the sides, I find it fit not to express any opinion on the question of condonation, but demolish the order so far as it rejected the application dated 21-2-1985 seeking condonation of delay with direction to the Authorities to revivify this application and to decide it afresh after hearing both the sides in this behalf. For this purpose, the points posed or opposed shall also be treated open and litigable. The Authority shall also take into account the conduct of the petitioner, the time spent in other proceedings and desirability or otherwise of examination of the matter on merits for doing justice between the parties and decide the question afresh in conformity with law. If the Authority elects to condone the delay, then the application submitted under Section 264 of the Income-tax Act shall be heard and decided on merits.

This petition is, thus, disposed of in terms indicated above, but without any orders as to costs. The security amount, if any, shall be refunded to the petitioner after due verification.

(1995) 126 Taxation 158 (Ori.)

IN THE HIGH COURT OF ORISSA

(Before Hon'ble Mr. Justice A. Pasayat &

Hon'ble Mr. Justice D.M. Patnaik)

SJC Nos. 22 & 23 of 1990

Commissioner of Income-tax

vs.

Permilla Singh & Co.

For the Appellant	:	**A.K. Ray**
For the Respondent	:	**P.K. Mishra, P.K. Jena, A.K. Panda, S.A. Khan & P.K. Harichandan**
Decided on	:	8-10-1993

PENALTY — Firm filing return late — Advance tax paid covering entire tax assessed — Revenue charging interest for late filing of return treating the firm as URF — Held, penalty to be calculated on the basis of tax payable by RF — Since the entire tax paid as registered firm, penalty could not be calculated by treating the firm as unregistered.

Income-tax Act, 1961 — Section 271(1)(a).

FACTS

The A.Ys. involved are 1980-81 and 1982-83. M/s Permilla Singh &

Co. is a partnership firm, which filed its returns of income before the ITO were Bhawanipatna. The returns, filed after the due date prescribed u/s 139 of the Act. Penal proceedings were initiated u/s 271(1)(a) for four years i.e. 1976-77, 1980-81, 1981-82 and 1982-83. Penalty of Rs. 13,920/-, Rs. 17,860/-, Rs. 10,480/- and Rs. 6,110/- were levied for the A.Ys. in question. The assessee filed appeals before the AAC. Taking note of the provisions of Section 271 (3)(d) of the Act, direction was given by the first appellate authority to restrict the amount of penalty to twice the amount of tax sought to be evaded as a registered firm. Both the assessee and the revenue filed appeals before the Tribunal. In the appeals filed by the revenue, the assessee filed cross objections. The specific stand of the assessee before the Tribunal was that no penalty was imposable as the advance tax paid by the assessee covered the entire amount of tax assessed as registered firm. Accordingly, the orders imposing penalty were set aside and the matter was remitted back to the file of the ITO to make fresh adjudication.

DECISION

The Hon'ble Court held that the emphasis on 'assessed tax' as appearing in section 271(1) is of great relevantce. Where the entire amount of tax has already been paid or being deduced at source or paid in advance, the question of imposing any penalty on the assessed tax does not arise because no tax is actually due. Where no amount of tax remains to be paid on completion of the assessment, the 'assessed tax' would be zero and any figure multiplied by zero would also be zero. Therefore, no penalty would be payable. The Hon'ble Court answered the question in the negative i.e. in favour of the assessee and against the revenue.

Cases referred to :

1. *Ganesh Dass Sreeram vs. ITO & Ors.* (1988) 169 ITR 221 (SC)
2. *CIT vs. Builders Engineers Co.* (1989) 175 ITR 317 (Raj.)
3. *CIT vs. Harish Chand & Co.* (1989) 179 ITR 419 (P&H)

Full text of the Judgment is given below :

JUDGMENT

(A. Pasayat, J.)

These two reference applications are interlinked and, therefore, are disposed of by this common judgment which shall govern each one of them.

On the basis of an application under s. 256(1) of the IT Act, 1961 (in short, the 'Act') filed by the revenue and pursuant to the direction given by this Court, the Income-tax Appellate Tribunal, Cuttack Bench (in short, the 'Tribunal') has referred the following question for adjudication by this Court.

"Whether, on the facts and in the circumstances of the case and in

view of the provisions of s. 271(2), penalty is to be calculated treating the firm as an unregistered firm when the assessee-firm committed default in submission of returns and rendered itself liable for penalty under s. 271(1)(a) ?"

In our view the question referred needs slight modification, and accordingly reframe the same for adjudication. Reframed question reads as follows :

"Whether, penalty can be levied under s. 271(1)(a) of the IT Act, 1961 on a registered firm by treating it as an unregistered firm in terms of s. 271(2) of the Act when no tax is payable by the registered firm after giving credit to advance tax paid and/or tax deducted at source ?"

The assessment years involved are 1980-81 and 1982-83. M/s Permilla Singh & Co. (hereinafter referred to as the 'assessee') is a partnership firm, which filed its returns of income before the ITO, Bhawanipatna. The returns were filed after the due date prescribed under s. 139 of the Act. Penal proceedings were initiated under s. 271(1)(a) for four years, i.e., 1976-77, 1980-81, 1981-82 and 1982-83. Penalty of Rs. 13,920, Rs. 17,860, Rs. 10,480 and Rs. 6,110 were levied for the assessment years in question. The assessee filed appeals before the AAC, Berhampur Range, Berhampur. Taking note of the provisions of s. 27(3)(d) of the Act, direction was given by the first appellate authority to restrict the amount of penalty to twice the amount of tax sought to be evaded as a registered firm. Both the assessee and the Revenue filed cross-objections. The specific stand of the assessee before the Tribunal was that no penalty was imposable as the advance tax paid by the assessee covered the entire amount of tax assessed as registered firm. To prop up its submission reliance was placed on a decision of the Apex Court in the case of *Ganesh Dass Sreeram vs. ITO & Ors.* (1988) 169 ITR 221 (SC). Revenue's stand was that the said case had no application and the provisions of s. 271(2) would be rendered nugatory if the plea is accepted. The Tribunal noticed that the decision in *Ganesh Dass's* case (supra) related to levy of interest under s. 139(8) of the Act, but its ratio was relevant. Reliance was also placed on a decision of Rajasthan High Court in *CIT vs. Builders Engineers Co.* (1989) 175 ITR 317 (Raj.). It was held that where advance tax paid covers the entire amount of assessed tax, penalty under s. 271(1)(a) is not leviable. Accordingly, the orders imposing penalty were set aside, and the matter was remitted back to the file of the ITO to make fresh adjudication in the light of the observations made. This direction was given keeping in view that the assessee's specific claim that the tax deducted at source exceeded the amounts of tax assessed. The appeals filed by the assessee were accordingly disposed of, but its cross-objections and the appeals filed by the Revenue were dismissed as infructuous, though delay in filing the appeals by the Revenue was condoned. A reference was sought for by the Revenue under s. 256(1) of the Act. The Tribunal was of the view that the Apex Court's

decision put the matter beyond a shadow of doubt, and, therefore, there was no necessity for making a reference. The Revenue moved this Court for a direction under s. 256(2) of the Act. That is how these reference applications are before us.

The learned counsel for the Revenue has submitted that the view of the Apex Court in *Ganesh Dass's* case (supra) related to levy of interest under s. 139(8) of the Act, and the ratio of that decision has no application to the case of penalty under s. 271(1)(a). The learned counsel for the assessee on the other hand submitted that the provisions are in *parti materia* and, therefore, the ratio of *Ganesh Dass's* case (supra) applies to the case of penalty under s. 271(1)(a).

For resolution of the controversy, a reference to ss. 139(8) and 271(1), so far as they are relevant, is necessary.

"139. *Return of income*—(1) to (7) xxx xxx xxx.

(8) Notwithstanding anything contained in cl. (iii) of the proviso to sub-s. (1), the ITO may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any person under any provision of this section."

"271. *Failure to furnish returns, comply with notices, concealment of income, etc.*—(1) If the ITO or the AAC in the course of any proceedings under this Act, is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-s. (1) of s. 139 or s. 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-s. (1) of s. 139 or by such notice, as the case may be, or

(b) has without reasonable cause failed to comply with a notice under sub-s. (1) of s. 142 or sub-s. (2) of s. 143, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income;

he may direct that such person shall pay by way of penalty,—

(i) in the cases referred to in cl. (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent, of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent of the tax;

(ii) in the case referred to in cl. (b) in addition to any tax payable by him, a sum which shall not be less than ten per cent but which shall not exceed fifty per cent of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income;

(iii) in the case referred to in cl. (c), in addition to any tax payable by

him, a sum which shall not be less than twenty per cent but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income.

Explanation — Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this *Explanation* referred to as the correct income) as assessed under s. 143 or s.144 or s. 147 (reduced by the expenditure incurred *bona fide* by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of cl. (c) of this sub-section."

The Apex Court in relation to levy of interest under s. 139(8) in *Ganesh Dass's* case (supra) observed as follows :

"Before we part with these appeals, we think we should clarify one situation, namely, where the advance tax duly paid covers the entire amount of tax assessed, there is no question of charging the registered firm with interest even though the return is filed by it beyond the time allowed, regard being had to the fact that payment of interest is only compensatory in nature. As the entire amount of tax is paid by way of advance tax, the question of payment of any compensation does not arise."

The emphasis on "assessed tax" as appearing in s. 271(1) is of great relevance. Where the entire amount of tax has already been paid being deducted at source or paid in advance, the question of imposing any penalty on the assessed tax does not arise because no tax is actually due. Penalty which can be imposed is a sumequal to two per cent of the "assessment tax" for every month during which the default continued. The expression "assessed tax",according to the *Explanation*, means "tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C". Thus, where no amount of tax remains to be paid on completion of the assessment, the "assessed tax" would be zero and any figure multiplied by zero would also be zero. Therefore, no penalty would be payable. The provisions of sub-s. (2) of s. 271 are attracted for quantification of the penalty only when it is imposable under sub-s. (1). In that event the registered firm loses the benefit of registration, on the penalty for which it has become liable has to be calculated depriving it of the benefit of registration and treating it as an unregistered firm. While deciding the liability of penalty under sub.s(1) effect has to be given to sub-s. (2) which comes into operation only to make the formula for calculating

the penalty under sub-s. (1) workable. When the assessed tax is nil it would be impracticable to impose penalty under sub-s. (2) of s. 271. Similar view expressed by the Rajasthan High Court in the case of *Builders Engineers'* case (supra) and by the Punjab & Haryana High Court in the case of *CIT vs. Harish Chand & Co.* (1989) 179 ITR 419 (P&H) has our concurrence.

Our answer to the question referred to is in the negative, in favour of the assessee and against the Revenue. No costs.

(1995) 126 Taxation 163 (Pat.)

IN THE HIGH COURT OF PATNA

(Before Hon'ble Mr.Justice S.B. Sinha &
Hon'ble Mr. Justice Narayan Roy)

Civil Writ Jurisdiction Case No. 2592 of 1993 (R)

Syed Askari Hadi Ali Augustine Imam

vs.

Union of India

For the Appellant	:	**P.K. Prasad**
For the Respondent	:	**Debi Prasad and Jhunjhunwala**
Decided on	:	23-9-1993

CLUBBING OF INCOME — Assessee creating trusts for benefit of minor children — Trusts created in pursuance of minors giving up their right in properties as a result of compromise in court — Assessee claiming income accruing to minors their individual income and not to be clubbed with income of father — Assessee also contending Section 64(1A) inserted by Finance Act, 1992 ultra vires — Held, provisions of section 64(1A) not ultra vires Article 14 and Entry 82 of List I of the 7th Schedule of the Constitution — Writ petition dismissed.

Income-tax Act, 1961 — Section 64 (1A).

Constitution of India — Article 14 and Entry 82 of List I of the 7th Schedule.

FACTS

In this writ application the petitioners, inter alia, have prayed for a declaration that section 64(1A) of the Income-tax Act, 1961 introduced by the Finance Act, 1992 which came into force from 1-4-1993 as ultra vires article 14 of the Constitution of India. The petitioners made a grant of Rs. 7 lakhs in favour of his wife and a further sum of Rs. 7 lakhs each in favour of his two minor children. The petitioner No. 1 allegedly made another trust on 23-2-1992 in favour of his minor children. Allegedly, the said trust was created as the minors had given up their rights in terms of a compromise petition filed in Title Suit No. 259 of 1983 in the Court of Subordinate Judge, Patna, concerning the

properties commonly known as 'Razwan'. It has, therefore, been contended that the petitioners 2 and 3 (minors) are liable to pay income-tax. According to the petitioner, in terms of the provisions of section 64(1A) income of a minor has been clubbed with the income of his parent. According to the petitioner, he did not have tax liability but in terms of the amended provisions the income of minor children would also be included in the total income of the petitioner.

DECISION

It has been held by the Supreme Court as also by this Court that such provisions are not *ultra vires* the Constitution of India. Reference in this connection may be made to *Nand Lal vs. State of Haryana* AIR 1980 SC 2097, *Maharao Saheb Shri Bhim Singhji vs. Union of India* AIR 1981 SC 234 and (1992) 2 BLJR 614. It has also been held by this Court as also by the Supreme Court that the property of a wife can also be clubbed with the property of her husband unless and until the wife is a judicially separated wife. Reference in this connection may be made to (1993) 2 BLJR 836. If the property of a minor child or a wife can be clubbed with that of the father/husband, there cannot be any doubt that the Parliament in its wisdom may make a law in terms whereof an income derived by a minor child can be clubbed for the purpose of assessment of income-tax with the income of one of his parents. In terms of *Explanation 1* appended to section 64 the income of a minor shall be included in the income of husband and wife whose total income is greater for the purpose of clauses 1 and 2 thereof. It is well known that the discretionary powers of legislature to make classification of laws dealing with taxation matters is much wider as compared to other laws. The Hon'ble Court also did not find any force that the impugned provision is contrary to or inconsistent with section 4. Section 64(1A) is machinery provision relating to computation of income. The Hon'ble Court, therefore, held that there is no merit in this application. It is accordingly dismissed.

Cases referred to :

1. *Nand Lal vs. State of Haryana* AIR 1980 SC 2097.
2. *Maharao Saheb Shri Bhim Singhji vs. Union of India* AIR 1981 SC 234.
3. *Smt. Indumati Singh vs. State of Bihar* (1983) 2 BLJR 836.
4. *Anant Mills Co. Ltd. vs. State of Gujarat* AIR 1975 SC 1234.
5. *Balaji vs. ITO* AIR 1962 SC 123.
6. *Umedray Worah vs. CIT* AIR 1965 Pat. 114
7. *Howard De Walden vs. IRC* (1942) 1 All ER 287.
8. *Ionian Bank Ltd. vs. Couvreur* (1969) 2 All ER 651.

Full text of the Judgment is given below :

JUDGMENT

In this writ application the petitioners, *inter alia,* have prayed for a declaration that section 64(1A) of the Income-tax Act, 1961 ('the Act') introduced by the Finance Act, 1992 which came into force from 1-4-1993 as *ultra vires article* 14 of the Constitution of India.

In view of the pure question of law, it is not necessary to state the facts of the matter in detail.

Suffice it to say that an irrevocable trust was created on 7-9-1988 by petitioner No. 1 for the support and maintenance of his wife (petitioner No. 3) as also his minor son and daughter. The petitioner No. 1 has contended that to the aforementioned trust, the petitioner has made a grant of Rs. 7 lakhs in favour of his wife and a further sum of Rs. 7 lakhs each in favour of his two minor children. The petitioner No. 1 allegedly made another trust on 23-2-1992 in favour of his minor children by initially contributing a sum of Rs. 10,000 but subsequently a further sum of Rs. 3,26,000 was contributed for the benefit, support and maintenance of the minor in equal shares. Allegedly, the said trust was created as the minors had given up their rights in terms of a compromise petition filed in Title Suit No. 259 of 1983 in the Court of Subordinate Judge, Patna, concerning the properties commonly known as 'Razwan' situated at Fraser Road, Patna. It has, therefore, been contended that petitioners 2 and 3 (minors) have own source of income and, thus, they are liable to pay income-tax. The Finance Bill, 1992 (38 of 1992) was introduced in the Lok Sabha, and the same was enacted by the Parliament with effect from 1-4-1993. In terms of section 35(b) of the said Finance Act, amendments were made in the Income-tax Act whereby sub-section (1A) to section 64 was inserted which reads as follows :

> "(1A) In computing the total income of any individual, there shall be included all such income as arises or accrues to his minor child :
>
> Provided that nothing contained in this sub-section shall apply in respect of such income as arises or accrues to the minor child on account of any —
>
> (a) manual work done by him; or
>
> (b) activity involving application of his skill, talent or specialised knowledge and experience.
>
> *Explanation* : For the purposes of the sub-sections, the income of the minor child shall be included,—
>
> (a) where the marriage of his parents subsist, in the income of that parent whose total income (excluding the income includible under this sub-section is greater; or

(b) where the marriage of his parents does not subsists, in the income of that parent who maintains the minor child in the previous year,

and where any such income is once included in the total income of either parent, any such income arising in any succeeding year shall not be included in the total income of the other parent, unless the Assessing Officer is satisfied, after giving that parent an opportunity of being heard, that it is necessary so to do."

According to the petitioner, in terms of the aforementioned provision income of a minor has been clubbed with the income of his parent. According to the petitioner, he did not have tax liability but in terms of the amended provisions the income of minor children would also be included in the total income of the petitioner.

Mr. N.K. Prasad, the learned counsel appearing on behalf of the petitioners has raised a short question in support of this application. The learned counsel submitted that in terms of List 1 of 7th Schedule of the Constitution the Parliament is empowered to enact law for imposition of income-tax upon an individual. The learned counsel submitted that in view of the charging section contained in section 4 of the Act,. read, with the definition of a person contained in section 2(31) thereof, any person who has an income is liable to pay tax. According to the learned counsel, thus, no distinction can be made between a minor and the major if both were having income for the purpose of payment of tax under the said Act. The learned counsel submitted that if the provision of section 64(1A) is not declared to be *ultra vires*, the same would lead to an absurdity inasmuch as an income derived by a minor by winning lottery and prize will also be included in the income of his father.

Section 2(31) defines the term 'person' as follows :

"(31) 'person' includes—

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses;"

Section 4 reads thus :

"*Charge of income-tax* —(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-

> tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year or previous years, as the case may be, of every person:
>
> Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.
>
> (2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."

In our opinion, the submissions made by Mr. Prasad cannot be accepted. Entry 82 of List I of Seventh Schedule of the Constitution covers the field of legislation in relation to the matters enumerated therein. The question as to whether the income of a minor will be clubbed with the income of one of the parents or not is also a matter covered under Entry 82 of List 1 of Seventh Schedule.

The Parliament as also the State Legislature have made several enactments in terms whereof the property of a minor is clubbed with the properties held by his parents, *e.g.*, Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land Act, 1961) and Urban Land Ceiling (Regulation) Act, 1976. In terms of the aforementioned Acts, the ceiling area has to be determined at the hands of the family which includes husband, wife and their minor children. Thus, for the purpose of determination of a ceiling area, the lands held and possessed by a minor have to be clubbed with the lands held and possessed by his parents.

It has been held by the Supreme Court as also by this Court that such provisions are not *ultra vires* the Constitution of India. Reference in this connection may be made to *Nand Lal vs. State of Haryana* AIR 1980 SC 2097, *Maharao Saheb Shri Bhim Singhji vs. Union of India* AIR 1981 SC 234 and (1992) 2 BLJR 614. It has also been held by this Court as also by the Supreme Court that the property of a wife can also be clubbed with the property of her husband unless and until the wife is a judicially separated wife. Reference in this connection may be made to (1993) 1 SCC 325 and *Smt. Indumati Singh vs. State of Bihar* (1993) 2 BLJR 836.

If the property of a minor child or a wife can be clubbed with that of the father/husband, there cannot be any doubt that the Parliament in its wisdom may make a law in terms whereof an income derived by a minor child can be clubbed for the purpose of assessment of income-tax with the income of one of his parent. In terms of *Explanation* I appended to section 64 the income of a minor shall be included in the income of husband and wife whose total income is greater for the purpose of clauses 1 and 2 thereof.

The Finance Minister also in his speech before the Parliament while introducing the said bill stated thus :

"60. It is said that the child is the father of man, but some of our taxpayers have converted children into tax shelters for their fathers. The tax law provides for clubbing of income from gifts given by parents but this does not apply to other income, including income from other gifted assets, and the practice of gifting is widely used to evade clubbing. The Chelliah Committee has recommended that in order to plug this loophole, which accounts for a substantial leakage of revenue, the income of a minor child should be clubbed with that of the parent. There is merit in this suggestion and I propose to accept it. Recognizing however the existence of a number of child prodigies, especially income, as also any wage income of minors, from the purview of such clubbing. The practice of clubbing the income of minor children with that of the parent for tax purpose is in vague in a number of countries."

Thus, it is evident that the aforementioned provision has been enacted for the purpose of checking evasion of tax. It is now well known that the Parliament and the Legislature while making an enactment for imposition of tax may also make enactment for the purpose of checking the evasion thereof.

In this view of the matter, in our opinion section 64A cannot be said to be *ultra vires* Entry 82 List I of the Seventh Schedule.

The contention of Mr. Prasad to the effect that minor children are also individuals and, thus, the said provision *ultra vires* article 14 has no substance.

As notice hereinbefore, there are several statutes in terms whereof, the properties of minor are to be clubbed with the properties of his father and, thus, there is absolutely no reason as to why income of minor cannot be directed to be clubbed with their father. The minors are classes in themselves and, thus, the question of the said Act being *ultra vires* article 14 does not arise.

It is now well known that the discretionary powers of Legislature to make classification of laws dealing with taxation matters is much wider as compared to other laws.

In the application of the principles, the Courts in view of the inherent complexity of fiscal adjustment of diverse elements, permits a larger discretion to the Legislature in the matter of classification so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways (See *Anant Mills Co. Ltd. vs. State of Gujarat* AIR 1975 SC 1234 at p.1244).

It is also well known that in computing the total income of any individual, the differentiation between cases of partnership, between husband, wife and/or minor children and partnership between others, made with the object of preventing evasion of tax, is not violative of article 14.

Reference in this connection may be made to *Balaji vs. ITO* AIR 1962 SC 123 and *Umedray Worah vs. CIT* AIR 1965 Pat. 114.

We also do not find any force that the impugned provision is contrary to or inconsistent with section 4. Section 64(1A) is machinery provision relating to computation of income.

In *Howard de Walden vs. IRC* (1942) 1 All ER 287, Lord Greene observed:

> "For years a battle of manoeuvre has been waged between the Legislature and those who are mined to throw the burden of taxation of their own shoulders on to those of their fellow-subjects. In that battle the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of whom the present appellant has not been the least successful. It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers." (p. 289)

Reference in this connection may also be made to *Ionian Bank Ltd. vs. Couvreur* (1969) 2 All ER 651 wherein Lord Denning stated :

> "It seems to me that the whole of the argument of counsel for the defendant depends on whether the documents in February 1966 were a sham. He relied very much on the words 'apparent alteration' in the paragraph of the defendant's affidavit which I have read. I think he is putting too much weight on the word 'apparent'. It is quite plain to me from the paragraph in the affidavit, and from the detailed amendment of the documents which the defendant himself made, that this was not a sham at all. It was a re-arrangement deliberately made so as to avoid tax. It was suggested that this re-arrangement might be illegal, but that point was not pressed very much, and I think rightly, because agreements or re-arrangements to avoid tax are made very day and are not illegal. It seems quite plain that what happened here was seeing that the original arrangement would attract tax, the parties deliberately re-arranged it so as to avoid tax. They made it in law what the documents show it to be, namely, a loan by the bank to the English company : a letter in which the wines were hypothecated by the English company as security for the loan and in addition guarantees given as to half the loan by the defendant, and as to the other half, by one of the associated companies.
>
> The long and short of it is that the defendant signed these guarantees; the money has been advanced by the bank; the defendant or his companies have had the wine; and the bank has not seen a penny or hardly a penny of it. In my judgment, the defendant's case is so shadowy that the judge was right in giving leave to defend only conditionally on the full amount being brought into Court. I find myself, therefore,

in agreement with the judge on both points and I would dismiss the appeal." (p. 655)

For the reasons aforementioned, there is no merit in this application. It is, accordingly, dismissed.

(1995) 126 Taxation 170 (Raj.)

IN THE RAJASTHAN HIGH COURT

(Before Hon'ble Mr. Justice Y.R. Meena & Hon'ble Mr. Justice V.K. Singhal)

D.B.I.T Case No. 32 of 1985

Commissioner of Income-tax

vs.

Shri Pramod Kumar Jain

For the Appellant	:	**G.S. Bapna**
For the Respondent	:	**None**
Decided on	:	10-2-1995

STANDARD DEDUCTION — Assessee claiming standard deduction on salary received as a partner from the partnership firm — Claim of the assessee disallowed — Held, salary income of a partner taxed as business income — Standard deduction not allowable.

Income-tax Act, 1961 — Section 16(1).

FACTS

The only controversy is regarding interpretation of section 16(1) of the Act as to whether the salary received by the assessee partners falls to be considered under the head "income from salaries" - and consequential standard deduction was allowable u/s 16(1) of the Income-tax Act, 1961.

DECISION

In case of an employment existence of relationship of master and servant has to be considered. The servant renders his services under the direct control and supervision of his master. The control and supervision of the employer is *sin qua non* of the relationship between the employer and the employee. Provisions of Section 40(b) provide that in case of a partnership firm any payment of salary to a partner is not allowable and has been treated as business income of the firm. The relationship of employer and employee cannot be said to be existing in case where partner is paid the salary, in accordance with the terms of partnership deed. The reference was decided in favour of the revenue.

Cases referred to :

1. *CIT vs. R.M. Chidambaram Pillai* (1977) 106 ITR 292 (SC)

2. *Regional Director ESIC vs. Ramanuja Match Industries* AIR 1985 SC 278
3. *Champaran Cane Concern vs. State of Bihar* (1963) 49 ITR 152 (SC)
4. *Kataria Transport Co. vs. CIT* (1988) Taxation 91 (3) 391 (Raj.), (1988) 170 ITR 626 (Raj.)

Full text of the Judgment is given below :

JUDGMENT

(V.K. Singhal J.)

The only controversy which has been raised in the present matter is regarding the interpretation of provision of Sec. 16(1) of the Income-tax Act, 1961 as to whether the salary received by the assessee partner falls to be considered under the head income from 'salaries' and consequently standard deduction is allowable u/s 16(1) of the Income-tax Act, 1961. The Income-tax Officer has rejected the claim of the assessee of standard deduction on the ground that the salary drawn by a partner from the partnership firm does not qualify for deduction u/s 16(1) of the Income-tax Act. The Appellate Authority has considered the matter and was of the view that the character of salary received by a partner from a partnership firm cannot be considered as chargeable under the head 'salaries'. In these circumstances the deduction u/s 16(1) was held not allowable to the assessee. The Income-tax Appellate Tribunal has however following its decision in the case of *Chhitarmal Goyal* allowed the standard deduction. On the request of the Revenue following question of law has been referred for the opinion of this Court u/s 256(1) of Income-tax Act, 1961 for 1982-83:

> "Whether on the facts and in the circumstances of the case the ITAT is justified in holding that the salary received by the assessee partner from M/s. Jaipur Printers falls to be considered under the head income from 'salaries' and consequently in allowing deduction u/s 16(1) of the I.T. Act, 1961 ?"

We have heard the arguments of learned counsel for the department and have considered over the matter. Section 15 of the Income-tax Act has provided for the income chargeable to income-tax under the head 'salaries'. The provisions of sec. 15 of the Act contemplates the jural relationship of employer and the employee. The various tests have been laid down with regard to the nature of the service rendered by a particular person including existence of the right in master to supervise and control the work done by the servant and the manner in which the work is to be done by him. In case of an employment existence of relationship of master and servant has to be established. The servant renders his services under the direct control and superintendence of his master. The control and supervision of the employer is *sine qua non* of the relationship between the employer

and the employee. In accordance with the provisions of Sec. 16 of the Act the deduction is allowable from the Income which is chargeable under the head of 'Salary'. In the case of a partner, the income which is received by way of salary is of the same character as income from business. Even under the law the firm is not a legal person or has any legal existence apart from its partners and is merely a compendious name to describe its parties. Though under Income-tax law it is a unit of assessment by virtue of special provisions, but it cannot be considered that the firm is an employer of its partner. The payment of salary to a partner represents a special share of the profits. The matter was considered by Apex Court in the case of *CIT vs. R.M. Chidambaram Pillai* (1977) 106 ITR 292 and it was held that there cannot be a contract of service, in strict law, between a firm and one of its partners. Payment of salary to a partner represents a special share of the profits. Salary paid to a partner retains the same character of the income of the firm as profit.

In *Regional Director ESIC vs. Ramanuja Match Industries* (AIR 1985 SC 278) it was held that a partner of a firm is not an employee of the firm.

In *Champaran Cane Concern vs. State of Bihar* (1963) 49 ITR 152 it was pointed out by the Apex Court that in a partnership each partner acts as an agent of the other. The position of a partner qua the firm is thus not that of a Master and a servant or employer and employee which concept involves an element of subordination but that of equals. The partnership business belongs to the partners and each of them is an owner thereof.

In *Kataria Transport Co. vs. CIT* (1988) 170 ITR 626 this Court has held that payment of City compensatory allowance by the firm to its partner is hit by Section 40(b).

The relationship of employer and employee cannot be said to be existed in a case where a partner is paid the salary, in accordance with the terms of partnership deed. The deed of partnership cannot be considered to be a contract of employment. It is only by a condition which has been stipulated in the deed of partnership, that the partner may be entitled to receive extra profit by way of salary from the firm. Generally every partner of a firm is entitled to participate in the business of the firm and the partner himself supervise and control the business, he cannot be considered as an employee of himself.

The Tribunal has referred to the decision in the case of *Commissioner of Agricultural Income-tax, Madras vs. Tipperary Estates Company* reported in (1970) 76 ITR 396 but in view of the decision of the Apex Court in the case of *R.M. Chidambaram Pillai* referred to above, the said decision cannot be considered laying down correct law.

It may also be observed that after the *Explanation* 2 added by Finance Act, 1992 from 1-4-1993 in section 15 makes it clear that the salary received by a partner of a firm shall not be regarded as salary but this amendment

have been brought on Statute book because of the change of basis of assessment of firm and partner under the new Scheme.

The provisions of Sec. 40(b) provides that in case of partnership firm any payment of salary etc. to a partner is not allowable and has been treated a business income of firm.

On the basis of above discussions and provisions of Sec. 15 read with sec. 16 of the Income-tax Act we are of the view that the Tribunal was not justified in allowing the standard deduction from salary received by a partner from the firm. Accordingly we answer the question in favour of Revenue and against the assessee. No order as to costs.

(1995) 126 Taxation 173 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Justice Y.R. Meena & Hon'ble Mr. Justice V.K. Singhal)

D.B. Estate Duty Reference No. 126 of 1984

Commissioner of Estate Duty

vs.

S.S. Mehta, Kota

For the Appellant	:	**G.S. Bafna**
For the Respondent	:	**None**
Decided on	:	10-1-1995

EXCLUSION OF ESTATE FROM PRINCIPAL ESTATE — Liability to tax — Deceased a member of the HUF — House owned by the HUF — Partly occupied by deceased — Other co-parceners living outside — Revenue including share of other co-parceners in the self-occupied portion in the estate of the deceased for rate purposes — Held, share of other lineal decendants liable to be included in the estate of the deceased for rate purposes.

Estate Duty Act, 1953 — Section 34(1)(c).

FACTS

Deceased has 1/5th share in immovable property belonging to HUF of which he was a karta. He was survived by his wife and three sons. For the purpose of taxation the share of lenial decendants in the self-occupied portion amounting to Rs. 36,000/- was included for rate purpose in view of section 34(1)(c). The Tribunal, however, exempted the self-occupied value from being included in the estate of the deceased. Being aggrieved, the revenue sought reference.

DECISION

The Hon'ble Court held that on the basis of language used in section 33(1)(n),

we are of the opinion that the exemption is in value only in respect of the property which belongs to the deceased and which passed on his death. HUF in which the lineal discendants have any interest cannot be said to be entirely belonge to the deceased, it is only the share of the deceased to that extent which passes on his death which is exempt. In view of the specific language of sub-section (c) of section 34(1), the share of lenial decendants in the co-parcenery property was includible in the principal estate of the deceased for rate purposes.

Cases referred to :

1. *Durga Prasad Beharilal* 116 ITR 892 (AP)
2. CED *vs.* *Nirmala Saxena* (D.B. Estate Duty Reference No. 112/83)

Full text of the Judgment is given below :

JUDGMENT

The Income-tax Appellate Tribunal has referred the following question of, law arising out of its order dated 10-2-1983 :

> "Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the share of lineal descendants in the self-occupied property was liable to be excluded from the principal estate of the assessee for rate purposes u/s 34(1)(c) of the Estate Duty Act, 1953?"

The brief facts of the case are that the deceased had one-fifth share in the immovable property belonging to HUF of which he was karta. He was survived by his wife and three sons. All the sons stayed outside in connection with either employment or profession. The value of the house, after adjustment of the loan, was taken at Rs. 1,60,000/-. The property was partly self-occupied and partly let out. The share of the lineal descendants was taken at Rs. 60,000/- in the let out portion and at Rs. 36,000/- in the self-occupied portion and both the amounts were included for the rate purposes in view of Sec. 34(1)(a) of the Estate Duty Act. On appeal, the Appellate Controller of Estate Duty excluded the sum of Rs. 36,000/- representing the share of lineal descendants in the self-occupied portion, following the decision of Andhra Pradesh High Court in the case of *Durga Prasad Beharilal*, 116 ITR 892. The order of the Appellate Controller of Estate Duty was accepted by the Tribunal and it was observed that the self-occupied portion which was used by the deceased was exempt. Except the deceased and his family, no stranger lived in the self-occupied portion. The part of the house was exclusively remained in the occupation of the deceased, therefore, was fully exempt u/s 33(1)(n) read with Clause (c) has no application to such portion.

This matter was considered by this Court in the case of *Controller of Estate Duty vs. Nirmala Saxena*, D.B. Estate Duty Reference No. 112/83 decided on 4-1-1995. It was observed by this court as under :

"In view of the various decisions referred above and on the basis of the language used in sec. 33(1)(n) we are of the opinion that the exemption is available only in respect of the property which belongs to the deceased and which passes on his death. The Hindu undivided property in which lineal descendants have any interest cannot be said to be entirely belonging to the deceased, it is only the share of the deceased to the extent which passes on the death which is exempt. It is his share alone which passes on his death and therefore, the exemption contemplated in Sec. 33(1)(n) is restricted to the share of the deceased. Under sec. 34(1)(c) the value of the lineal descendants of the deceased in the coparcenary property has to be aggregated with the principal value of the estate of the deceased for the purposes of rate of duty.

In view of the specific language of sub-section (c) of Sec. 34(1) validity of which has already been upheld by the Apex Court, the interest of lineal descendant is liable to be included and therefore, we are of the view that Income-tax Appellate Tribunal was not justified in holding that the share of lineal descendants in coparcenary property was not includible in the principal estate of the deceased for rate purpose u/s 34(1)(c)."

Following the above decision we are of the opinion that the Tribunal was not justified in holding that the share of the deceased in the self-occupied portion was able to be excluded for rate purposes u/s 34(1)(c) of the Estate Duty Act.

Accordingly the reference is answered in favour of the revenue and against the assessee. No order as to costs.

(1995) 126 Taxation 175 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Justice Mr. Y.R. Meena & Hon'ble Justice Mr. V.K. Singhal)

D.B.I.T. Reference No. 56 of 1986

Commissioner of Income-tax

vs.

M/s Sardar Stones, Kota

For the Appellant	:	**G.S. Bapna**
For the Respondent	:	**None**
Decided on	:	7-2-995

DEPRECIATION — Assessee a trader in stones — Two trucks owned for transportation of stones from mines to the depot as well as to the customers — Occasionally trucks hired out to a sister concern — Assessee claiming depreciation at 40% — Held, hiring of trucks to sister concerns occasionally not a business of

hiring — Trucks mainly engaged in transportation of stones sold by the assessee — Not entitled to depreciation at 40%.

Income-tax Act, 1961 — Section 32.

Income-tax Rules, 1962 — Appendix I.

FACTS

The assessee is a trader in stones. It owned two trucks which are used for transportation of stones from site to mines to depot as well as to the customers. The claim of the assessee was that the trucks were occasionally used for hiring and when not in use by the assessee hired out the same to its sister concern. The income from hiring of trucks in this manner was Rs. 33,155/- and the expenditure on running and maintenance of trucks was Rs. 1,90,663/- The sale of stones was Rs. 21,25,660/-. The assessee claimed depreciation at 40% which was allowed by the Assessing Officer but subsequently the order was revised by the CIT u/s 263 holding that since the assessee was not carrying on business of running the trucks on hire it was entitled to depreciation at 30%. The Tribunal, however, allowed assessee's claim on the ground that the sale price of stones included the truck hire charges as well and as such it could be held that the assessee was running the trucks on hire.

DECISION

The Hon'ble Court found that the assessee was mainly a trader in stones and was using the two trucks for transportation of stones from mines site to the depot as well as to the destination of the customers. There was no evidence on record that the assessee was in the business of running the vehicles on hire. The business of running the vehicles on hire is entirely different than to give the vehicles on hire casually. It is the main activity and the intention behind thereof which has to be considered for the purpose of hiring. The Tribunal was, therefore, not justified in allowing depreciation at 40%. The reference of the revenue was allowed.

Full text of the Judgment is given below :

JUDGMENT

(V.K. Singhal, J.)

The Income-tax Appellate Tribunal has referred the following question of law arising out of its order dated 30th September, 1985 in respect of the assessment year 1982-83, under section 256(1) of the Income-tax Act, 1961:

> "Whether on the facts and circumstances of the case, the Tribunal was right in coming to the conclusion that the sale price realised included price of stones as well as hire charges of trucks from the customers and thereby holding that the assessee is entitled to depreciation at 40% and not at 30% as is allowable in case of motor lorries."

The brief facts of the case are that the assessee is a trader in stones and owned two trucks which are used for transportation of stones from the site of mines to the depot of the assessee as well as to the customer's premises. The claim of the assessee was that the trucks were occasionally and when not in use by the assessee were hired out to a sister concern. The income from hiring of the trucks in this manner was at a figure of Rs. 33,155. The value of the truck was shown at a figure of Rs. 3,82,280, and the expenditure on the running and maintenance of trucks was Rs. 1,90,663. The sale of the stones during the year was to the tune of Rs. 21,25,660. The assessee claimed depreciation @40% on the trucks which was allowed by the Income-tax Officer while assessing u/s 143(3) of the Act. Subsequently the Commissioner of Income-tax exercising the power u/s 263 of the Act came to the conclusion that the rate of depreciation @ 40% is allowable only when the assessee was carrying on the business of trucks running on hire. Since the assessee was not carrying on the business of running the trucks on hire, therefore the depreciation was allowable @ 30% only. The order was therefore prejudicial to the Revenue and the assessment order was accordingly set aside with the observation that the trucks were entitled to depreciation @ 30% in accordance with the clause (iii)-D(9) of the schedule of Depreciation-Appendix-I of the I.T. Rules, 1962. In appeal before the CIT(Appeal) it was contended that the trucks were used in connection with the transportation of sale of stones to the customers. The customers were charged not only for the purchase of stones but also for the transportation, and therefore such charges are hire charges. It was, therefore, contended that the trucks were not required for transportation of the stones of the assessee and were hired to the sister concern and the income received therefrom has separately been shown. The Commissioner of Income-tax (Appeals) found that in accordance with the language used in (iii)/E(1A) of the depreciation table which uses the words "used in a business of running them on hire" means that the assessee must not only by giving the trucks on hire but also carrying on a business of running the trucks on hire. The fact which was also taken also consideration by the Commissioner of Income tax was that this could be at the time only when there must be continuity for regularity on hiring transaction. The casual hiring to sister concern is not sufficient to justify it that the assessee was carrying on the business of hiring as well, and therefore the depreciation @30% was directed to be computed.

In second appeal before Income-tax Appellate Tribunal, the Tribunal following its earlier decision in the case of *M/s. Manjeet Stones Co.* observed that the assessee was using the trucks for transportation for itself and customers and also hired the trucks whenever the trucks were not required for transportation of the stones. The sale price of the stones was charged from the customers which included truck hiring charges as well. The Tribunal further came to the conclusion that the same value was not bifurcated

between the sale price of stones, and transportation charges and for that reason it does not mean that the trucks were not used on hire by the customers. The order of the case of *M/s. Manjeet Stones Co.* came up for consideration before this Hon'ble Court in DBIT Reference No. 77/85 decided on 22-11-1990 and following observations were made :-

"A plain reading of both these entries i.e. Entry No. III(ii)D(9) and III(ii)-E (1-A), given in part I of Appendix-1, appended to the Rules, show that if the motor buses, motor lorries and motor taxis are used in a business of running them on hire then those motor vehicles are covered under Entry III(ii) E (1-A) of the Appendix-1 and are entitled for depreciation @ 40% and the motor buses and motor lorries other than those used in a business of running them on hire are entitled for depreciation @ 30%. It is true that the relevant clause does not lay down the requirement of hiring a duty wholly or exclusively, but the entry has maintained the distinction about the entitlement of depreciation @ 40% and 30%. In the case of motor buses and motor lorries other than those used in a business of running them on hire are entitled for a depreciation @ 30% while the motor buses, motor lorries and motor taxis used in a business or running them on hire are entitled for the depreciation @ 40%. If a truck is not used for hiring but for the purpose of one's own business, then it would be entitled for depreciation @ 30% and not 40%. The context of the relevant entry does indicate the same.

In the present case, the business of the assessee is that of mining and sale of stones excavated from the mines and the trucks are used mainly for its business of mining. They are used mainly for carrying the stones from the mine-site to the sale depot or to the godown of the assessee. If the trucks are being used for its own business then they are entitled for depreciation @ 30% only, as the assessee was not using the trucks in the business or running them on hire. The Registration of the trucks as 'public carriers' will not, in any way, affect the eligibility of the depreciation as the main consideration as per Entry III (ii) E (1-A) is that the assessee is using the vehicle in the business of running them on hire. The business of the assessee is quarrying and selling the stones after excavation and not of hiring. If small portion of its income is received from the business of hiring from two or three transactions of hiring, then it will not make the business of the assessee as the business of hiring the trucks. Even otherwise, when we look into the finding arrived at by the Tribunal regarding the business of the assessee, then we find that the assessee is of quarrying and selling the stones and the trucks are mainly used for carrying the stones from the mines to the sale depot. As the trucks were mainly used by the assessee in its own business for carrying the stones from the mine-site to the sale depot, the case of the assessee is, therefore, covered by Entry No. III(ii)D-(9) and not by Entry No. III(ii)E(1-A), and as such the assessee is entitled

for depreciation @30% and not @40%. In this view of the matter, we are of the opinion that the Tribunal was not right in holding that the assessee is entitled to depreciation @40% and not 30% on the trucks and dumpers used by it for its business."

The rate depreciation which provided in respect of motor lorries other than those in a business of running then hire is @30%. If the motor buses, motor lorries and motor taxis are used in a business running them on hire then the depreciation is allowable @40% in accordance with the law. The finding which has been recorded by the Tribunal is that there is no specifically mention in respect of hire charges of the truck in the bill, yet the hire charges should be considered to have been realised. The dispute was not with regard to the hire charges, but was with regard to the nature of business.

The Tribunal has observed that the trucks of assessee are hired to his customers for transportation of their goods and it does not make any difference if the separate amount of transportation has not been shown in the bill. It is possible that the transportation charges are not shown separately and yet may be realised. This is, which happens in a case where the terms of contract provide that the goods are to be supplied f.o.r. destination of buyer, for that purpose the entire responsibility of transportation of the goods to destination of buyer remains of supplier. There may be other contingency also where the hire charges may not be shown separately in the bill itself. Even charging or showing hire charges separately in the bill would not be the only determinative factor but the Tribunal was required to come to the conclusion as to whether the assessee was carrying on business of running the vehicle on hire. Charging of the hire for the use of vehicle may be casually as was found in the present case and the main business was of carrying on stones from the mines to the depot of the assessee and also to the destination of the customer. The business of running trucks on hire by transportation stand on a different footing than using of the truck on hire by a person which is considered different business for which the rate of depreciation has been separately provided. The view this Court has taken in the case of *CIT vs. Manjeet Stones* referred to above that the trucks were mainly used by the assessee for carrying stones from the mine site to the sale depot and therefore he should be entitled to depreciation @ 30% is undisputed in the facts of the present case also.

In the statement of case the assessee has been stated a trader of stones and is using two trucks for transportation of stones from mine site to the depot of the assessee as well as to the destination of the customers. It has nowhere come on record that the assessee was carrying on the business of running the vehicle on hire. The business of running the vehicle on hire is different than to give the vehicle on hire casually. The vehicle may be given on hire occasionally which may or may not constitute of carrying on business of running them on hire. It is main activity and the intention behind thereof which has to be considered for the purpose of hiring as

to whether the assessee is carrying on the business of running vehicle on hire or not. Even those motor buses, motor lorries etc. which are not used in the business of running them on hire is entitled to depreciation @ 30%. The limit of 40% of depreciation to motor buses, motor lorries and motor taxis is provided because more running is required in the business of running them on hire. In these circumstances, even the Tribunal has not disputed the finding of the Commissioner of Income-tax that assessee was not engaged in the business of running the vehicle on hire and for that reason and for the reason that the decision which was relied upon by the Tribunal has already been reversed by this Court, we are of the view that the Tribunal was not justified in coming to the conclusion that the sale price realised including the price of stones as hire charges from customers, that is why the assessee is not entitled to depreciation @ 40% and depreciation @30% as is allowable in the case of motor lorries of the assessee.

Accordingly the reference is answered in favour of the Revenue and against the assessee. No order as to cost.

(1995) 126 Taxation 180 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Justice Mr. Y.R. Meena & Hon'ble Justice Mr. V.K. Singhal)

DBIT Reference No. 27 of 1986

Commissioner of Income-tax

vs.

R.G. Ispat Ltd.

For the Appellant	:	**G.S. Bafna**
For the Respondent	:	**Anant Kasliwal**
Decided on	:	12-1-1995

PLANT — Meaning of — Massive reinforced concrete structure designed to take up loads — Assessee contending structure to be a plant — Held, such a structure 'plant' within the meaning of Section 43(3) of the Income-tax Act.

Income-tax Act, 1961 — Section 43(3).

FACTS

The controversy in the present case is that the assessee had raised massive reinforced concrete structure which was capable of taking up loads. It was not merely a structure for location of plant but the structure which makes the plant operative and workable. It was contended on behalf of the assessee that such a structure should be given the meaning of plant u/s 43(3). The Tribunal agreed with the assessee. Being aggrieved, the revenue sought reference.

DECISION

The Hon'ble Court held that the portion of the structure which was required to make the cranes operative and in absence of which it was not possible to operate the cranes. The construction of such a structure specially desinged for that purpose would fall within the definition of 'plant'. The extra structure which is in addition to such structure could not be considered as plant. The Hon'ble Court, therefore, held that the massive reinforced concrete structure specially desinged to take up loads constituted plant within the meaning of Section 43(3). The reference was decided in favour of the assessee.

Full text of the Judgment is given below :

JUDGMENT

The following question of law has been referred by the Income-tax Appellate Tribunal vide its order dated 22-4-1985 in respect of assessment year 1980-81 u/s 256(1) of the Act:

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the massive reinforced concrete structure especially designed to take up loads, constituted "plant" within the meaning of section 43(3) of Income-tax Act, 1961 ?"

The controversy in question is covered by the decision given by this Court in the case of assessee in respect of assessment years 1976-77 and 1977-78 reported in (1994) 210 ITR 1018 *CIT vs. R.G. Ispat Ltd.* It was observed in that case as under :-

> "The Tribunal has observed that the blue print of the structure was produced before them and they were satisfied that structure has been raised to provide support to the gigantic cranes. On the basis of this blue print, the Tribunal came to the conclusion that the structures were raised to make the plant operative which could not have functioned in its absence. It was further observed that it is not a mere structure for location of the plant but the structure which makes the plant operative and workable. There may be a structure which falls within the category of building and plant. Whether the structure is a building or a plant has to be examined on the basis of the functional test. The use of the structure makes the distinction between plant or building in which it could be categorised. In the present case, the revised return was submitted in the proceedings initiated on the basis of the directions issued under section 263 of the Income-tax Act. The claim of the assessee was rejected by the Income-tax Officer and the said revised return was not accepted. The proper course for the Commissioner of Income-tax would have been to first determine as to whether the revised return was liable to be entertained or to be ignored. No such decision has been taken by the Commissioner of Income-tax and he has proceeds

on the basis of the nature of the structure and held that it is plant. The only question which has been raised before us is with regard to the justification in holding the structure as plant within the meaning of section 43(3) of the Income-tax Act and the Income-tax Appellate Tribunal has mentioned that the structure was raised to make the plant operative which could not have functioned in its absence. Therefore, we are of the view that the portions of the structure which were required to make the cranes operative and in the absence of which it was not possible to operate the cranes and the construction of such structure was specially desinged for that purpose, the structure would fall within the definition of "plant". The extra structure which is in addition to such structure could not be considered a "plant".

In view of the opinion already given by this Court, we are of the view that the massive reinforced concrete structure, specially designed to take up loads constitutes "plant" within the meaning of section 43(3) of the Income-tax Act, 1961. The reference is accordingly answered in favour of the assessee and against the revenue.

(1995) 126 Taxation 182 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta &

Hon'ble Mr. Justice Mr. Bhagabati Prasad

Reference Application Nos. 468 & 469 of 1985

Commissioner of Income-tax

vs.

Hindustan Paper Corporation Ltd.

Decided on : 23.2.1994

INCOME DEEMED TO ACCRUE OR ARISE IN INDIA — Agreement for avoidance of double taxation between India and France — French firm setting up plant for Indian company — Assessee seeking permission to remit money — ITO passing order u/s 195(2) to deduct tax on 50% remittance at 20% and on balance 50% at 40% — Assessee filing appeal — Tribunal holding no tax payable by French firm — Held, in the case of conflict between double tax avoidance agreement and the Act, provisions of double tax avoidance to prevail — In the event of Act being favourable, the provisions of Act being applicable — The option with the assessee — Matter remanded to Tribunal to consider the scope of technical and engineering services to be provided — Not possible to decide the matter regarding taxability till the finding arrived by the Tribunal.

Income-tax Act, 1961 — Sections 9(1)(vii) and 90.

Double Taxation Avoidance Agreement between Indian Govt. and French Govt.

Circular of CBDT No. 333 dated 2.4.1982.

FACTS

The assessee company entered into an agreement with Kerbs & CIE, S.A. Paris, France on 29.10.1981 setting up a plant for the production of Caustic Soda Chalorine and Chloride Chlorine Deoxide at Nowgang Paper Project. The assessee company made an application to the ITO on 30.6.1982 for ascertaining the rate of tax which could be deducted at source by the assessee company on the remittance of French Franc 2,70,000 to the French Firm. The ITO passed an order on 8.7.1982 u/s 195(2) of the Act, directing the assessee company to deduct tax at the rate of 20% on the 50% of French Franc 2,70,000 and at the rate of 40% on the balance 50% of French Frances 2,70,000. It was also directed that the tax should be calculated on tax basis as the assessee company was required to remit French Frances 2,70,000 net of India tax. A Double Taxation Avoidance Agreement exists between the Govt. of India and the Govt. of French Republic. This agreement provides that the industrial or commercial profits of an enterprise of one of the contracting States shall not be subjected to tax in the other contracting State unless the enterprise has a permanent establishment situated in that other contracting State. The question involved in whether the consideration received by the French firm for the supply of various technical knowhow and basic engineering services as also for supply of imported equipments constitutes industrial or commercial profits. The CIT(A) felt that the profits arising, if any, to the French firm under the said agreement were clearly industrial or commercial profits. The Tribunal held that no tax was payable by the French firm and, therefore, there was no question of deducting any tax at source either at the rate of 20% or at the rate of 40%.

DECISION

The Hon'ble Court held that it is by now well settled that wherever there is a conflict between a DTA and the specific provisions contained in the Income-tax Act, the provisions of DTA will prevail over the statutory provisions contained in the said Act. In this connection reference may be made to Circular No. 333 dated 2.4.1982. Thus, where a DTA provides for a particular mode of computation of income, the same should be followed irrespective of the provisions in the agreement, it is the basic law, i.e. the Act, that will govern the taxation of income. Further in view of sub-section (2) of section 90, the assessee has an option to claim that provisions of the Act may be made applicable if these are more beneficial to the assessee. The nature of knowhow and basic engineering services as well as supply of imported equipments to the French firm, supervision, eraction and

commissioning, including training of technical personel to be carried out by the French firm seem to suggest that this comes within the purview of industrial or commercial profits and not within the purview of the expression royalties. A perusal of the scope of technical and engineering services to be provided by the French firm to the assessee company shows that the French firm will also assist the Indian company in the installation of the plants being sold by them to the assessee company. This part of the matter has not been considered either by the CIT (A) or by the Tribunal, and requires consideration. The case was sent back to the ITAT.

Full text of the Judgment is given below :

JUDGMENT

(Ajit K. Sengupta, J.)

In this reference under section 256(1) of the Income-tax Act, 1961 ('the Act') at the instance of the revenue, the following questions have been referred by the Tribunal for the opinion of this Court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in considering that the consideration of French Franc 2,70,000 was from Engineering or Commercial activity of the non-resident company Kerbs & CIE, S.A. Paris, France ?

2. Whether, the Tribunal was justified in arriving at conclusion as mentioned in question No. 1 above without going into the express provisions in *Explanation* appended to section 9(1)(vii) of the Income-tax Act, 1961 which define technical services ?"

The facts giving rise to this reference as summarised by the Tribunal are as under :

This reference relates to an agreement entered into by the assessee-company with Kerbs & CIE, S.A. Paris, France on 29.10.1981 setting up a plant for the production of Caustic Soda Chlorine and Chloride Chlorine Dioxide at Nowgang Paper Project. The assessee for company made an application to the ITO on 30.6.1982 for ascertaining the rate of tax which could be deducted at source by the assessee-company on the remittance of Frence Franc 2,70,000 to the French firm. The ITO passed an order on 8.7.1982 u/s 195(2) of the Act, directing the assessee-company to deduct tax at the rate of 20% on the 50% of French Franc 2,70,000 and at the rate of 40% on the balance 50% of French Franc 2,70,000. It was also directed that the tax should be calculated on tax basis as the assessee company was required to remit French Franc 2,70,000 net of Indian tax.

Clause II of the said agreement executed between the assessee-company and the said French firm deals with the scope of work. The French firm being the vendor under the said agreement agreed to provide and the

assessee-company being the purchaser agreed to avail of it and buy the following :

(a) Know-how and basic engineering services for Chlorate-Chlorine Dioxide section of the plants;

(b) machinery and equipment of imported origin for both Chloride-Chlorine Dioxide section of the plant;

(c) Supervision; erection and commissioning of the said two plants; and Castic Soda Chlorine.

(d) Training of technical personel of the assessee-company for Chlorate-Chlorine Dioxide section of the plant.

The total consideration payable by the Indian company to the French firm in respect of all the aforesaid matters was stated under Clause IV to be French Franc 11,372,000 and Swiss Franc 2,148,500. The remittance of French Franc 2,70,000 in respect of which the said order dated 8-7-1982 was passed under section 195(2) was in the fact the first instalment of the total consideration as aforesaid as stipulated in the said agreement.

A Double Taxation Avoidance Agreement (DTA) exists between the Government of India and the Government of French Republic. This agreement is dated 26-3-1969. Article III(1) of the said agreement clearly provides that the industrial or commercial profits (excluding the profits derived from the operation of ships or aircrafts) of an enterprise of one of the contracting States shall not be subjected to tax in the other contracting States unless the enterprise has a permanent establishment situated in that other contracting State. If it has such a permanent establishment, the profits attributable thereof shall be subjected to tax only in that other contracting State. Article III(5) further provides that the term 'industrial or commercial profits' as used in this article shall not include income in the form of dividends, interests, rents, royalties and similar payments as referred to in paragraph (2) of article VII, capital gains, remuneration for personal services or fees for technical services. The term 'permanent establishment' is defined in article II(i) of the said agreement to mean a fixed place of business in which the business of the enterprise is wholly or partly carried on. The term 'fixed place of business' shall include a place of management, a branch, an office, a factory, a workshop, a warehouse, a mine, a quarry or other places of extraction of natural resources.

Article VII(1) of the said DTA further provides that royalties derived by a resident of one of the contracting States from sources in the other contracting States may be taxed in both the contracting States. Article VII(2) defines the term 'royalties' to mean payments of any kind received as consideration for the use of, or for the right to use any copyrights of literary, artistic or scientific works, cinematogrphic films, patents, models, designs, plans, secret process of formulate, trademarks or for the use or for the right to

use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience, but does not include any royalty or similar payments in respect of the operation of mines, quarries or other places of extraction of natural resources.

The question involved in this reference is whether the consideration received by the French firm for the supply of various technical know-how and basic engineering services as also for supply of imported equipments constitutes industrial or commercial profits within the meaning of article III(5) of the DTA agreement between the Government of India and the Government of France.

The Commissioner (Appeals) looked into the terms of agreement executed on 29-10-1981 between assessee-company and the French firm and after examining the DTA, the Commissioner (Appeals) felt that the profits arising, if any, to the French firm under the said agreement were clearly 'Industrial or commercial profits' within the meaning of article III(5) of the DTA. He, therefore, felt that the assessee-company was not required to deduct any tax at source before making remittance to the French firm since such industrial or commercial profits, if any, derived by the French firm under the said Agreement were liable to be taxed only in France and not in India in view of the specific provisions contained in article III(1) of the DTA as aforesaid.

On appeal by the revenue, the Tribunal also examined the said agreement dated 29-10-1981 entered into between the assessee-company and the French firm and after considering the provisions of the DTA, the Tribunal felt that the said agreement provided for supply of setting up of a plant with the engineering services of the French party. The enterprise taken by the French party in supplying and setting up the plant with its engineering services was nothing but to derive the profits which come within the purview of 'industrial or commercial profit'. As defined in article III(5) of the DTA and, therefore, according to the Tribunal, no tax was payable by the French firm. The Tribunal also considered the alternative argument of the departmental representative to the effect that the definition of royalty, as contained in section 9 of the Act, should also be considered. The Tribunal felt that since royalty has also been defined in DTA itself, there was no need to go to the definition of royalty contained in article VII(2) of the DTA, the Tribunal felt that the total consideration payable by the assessee-company to the French firm was not for use of or right to use, the patents, designs, secret process or formulae, etc., as contemplated under article VII(2) of the DTA. In that view of the matter, the Tribunal held that no tax was payable by the French firm and, therefore, there was no question of deducting any tax at source either at the rate of 20 per cent or at the rate of 40 per cent as originally directed by the ITO in his order dated 8-7-1982 passed under section 195(2).

The learned counsel appearing for the revenue before us submitted that the tribunal misconstrued the provisions of article III and article VII(2) of the DTA and it failed to consider the definition of royalty and technical service fees as contained in section 9. According to him, the total payments made by the assessee-company for know-how and basic engineering services came within the expression 'royalty' as denied under article VII of the DTA and, therefore,, it was wholly taxable in this country. He submitted that the payments made to the French firm did not come within the expression 'industrial or commercial profits' as defined in article III(5) of the DTA. The learned counsel appearing for the revenue also submitted that it is necessary to consider the definition of royalties as contained in section 9 in addition to the definition contained in DTA.

Dr. Pal, the learned counsel, appearing for the assessee, however, reiterated the submissions made before the Commissioner (Appeals) as well as before the Tribunal. He, therefore, submitted that the non-resident French firm in this case has agreed to supply the imported equipments as also the know-how and basic engineering services on an outright basis to the assessee-company in terms of the said agreement executed on 29-10-1981. The property right in such know-how and basic engineering service has not been retained by the vendor, namely, the non-resident French firm. In case of royalty, the vendor retains the right of property over the know-how and the basic engineering services but allows the vendor to use or utilise them and, therefore, what is paid for the use of the know-how and basic engineering is royalty. In the present case, however, according to the learned counsel for the assessee, the know-how and basic engineering services were sold out by the French firm to the assessee-company on outright sale basis and the French firm, the vendor, did not retain any property or other right over the same. It was further submitted by Dr. Pal that there was no provision in the agreement for limiting the use of the rights for a certain period nor the assessee-company was given an exclusive right to use the know-how for a limited period. This was so because it was a case of sale on outright basis in terms of the said agreement. He, therefore, submitted that the Tribunal was fully justified in holding that no part of the consideration payable by the Indian company, the assessee-company, to the French firm was chargeable to tax in India.

At the outset we may deal with the alternative argument raised before us by the learned counsel appearing for the revenue to the effect that the Court should also look into the definition of royalty as contained in *Explanation* 2 to section 9(1)(vi). It is by now well-settled that wherever there is a conflict between a DTA and the specific provisions contained in the Income-tax Act, the provisions of DTA will prevail over the statutory provisions contained in the said Act. In this connection reference may be made to circular No. 333, dated 2-4-1982 (1982) 137 ITR (St.) 1. The CBDT made it quite clear that where a specific provision is made in the DTA, that provisions

will prevail over the general provisions contained in the Act. In fact, the DTA which has been entered into by the Central Government under section 90 of the Act, also provides that the laws in force in a country will continue to govern the assessment and taxation of income in that country except where provisions to the contrary had been made in the agreement. Thus, where a DTA provides for a particular mode of computation of income, the same should be followed irrespective of the provisions in the Act. Where there is no specific provision in the agreement, it is the basic law, *i.e.*, the Act, that will govern the taxation of income.

We also find that sub-section (2) has been inserted in section 90 of the Income-tax Act, by the Finance (No.2) Act, 1991 with retrospective effect from 1-4-1992. Sub-section (2) so inserted as aforesaid clearly provides that where the Central Government has entered into an agreement with the Government of any country outside India under section 90 for granting relief of tax or, as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

In other words, it is very clear that the DTA Agreement shall always prevail even when an anormaly is noticed between the provisions of the Act and the provisions of DTA. Further, in view of sub-section (2) of section 90, the assessee has an option to claim that provisions of the Act may be made applicable if these are more beneficial to the assessee. In other words, the provisions of the Act, which are against the assessee can never be made applicable. In these circumstances, it is not at all necessary for us to look into the definition of royalty as contained in *Explanation 2* to section 9(1)(vi), since it is common ground that the issue in question is covered by the DTA.

Both the Commissioner (Appeals) as well as the Tribunal have looked into the agreement dated 29-10-1981 executed between the assessee-company and the French firm. These two tax authorities have also examined the provisions of the DTA and more particularly the definition of the expression 'permanent establishment' as contained in article 2(i), the provisions of article III which deal with the industrial or commercial profits that have to be taxed as well as article VII which contains the definition of the expression 'royalties' and which lays down that royalties derived by a resident of one of the contracting States from sources in the other contracting States may be taxed in both the contracting States. If the consideration payable by the assessee-company can come within the expression 'royalty' as defined in article VII(2) of the DTA, there is no difficulty in holding that such royalty can be taxed in India. But in this case, the nature of know-how and basic engineering services as well as supply of imported equipments to the French firm, supervision, erection and commissioning, including training of technical personnel to be carried out by the French firm, seem to suggest that this comes within the purview of industrial or commercial profits, and not

within the purview of the expression 'royalties' as defined in article VII(2) of the DTA. It is not a case of payment of consideration by the Indian company for the use of or for the right to use any patent, models, designs, plans, secret process or formulae or for the use of or for the right to use industrial, commercial or scientific equipments or for information concerning industrial, commercial or scientific experience.

We, however, find that one of the stipulations under DTA between the Government of India and the Government of French Republic was to the effect that where a resident of one of the contracting States fulfils an order for sale of machinery to a resident of other contracting State and it is incidental to the sale of the machinery that a person or persons employed by the resident of the first-mentioned contracting States should proceed to the other contracting States although assisting in the installation of the machinery therein, such activity, shall not be deemed to constitute a permanent establishment unless it is carried on for a period exceeding 3 years or the expenses incurred on such activity are more than 10 per cent of the total sale price of the order. Sub-clause (bb) of clause (i) of article II (1) of the DTA further lays down that an enterprise of one of the contracting States shall be deemed to have a fixed place of business in the other contracting States, if it carries out in the other contracting State a construction, installation or assembly project or the like. In that event it will be a case of permanent establishment within the meaning of article 2(1)(i). In that case some tax liability will arise in the hands of the French firm in respect of the amount payable by the assessee-company and such tax liability will have to be determined having regard to the provisions contained in clauses (2), (3) and (4) of article III of the DTA. A perusal of the scope of technical and engineering services to be provided by the French firm to the assessee-company shows that the French firm will also assist the Indian company in the installation of the plants being sold by them to the assessee-company. This part of the matter has not been considered either by the Commissioner (Appeals) or by the Tribunal. In our view, this aspect requires consideration.

We, therefore, decline to answer the questions referred to us and remand the matter to the Tribunal and direct it to consider this aspect of the matter as well. Both the assessee as well as the revenue shall be entitled to place facts as may be considered necessary by the Tribunal for considering this aspect of the matter. The Tribunal will re-decide the matter afresh in the light of the observations made by us in this judgment.

Banerjee, J. - I agree.

(1995) 126 Taxation 190 (Guj.)

IN THE HIGH COURT OF GUJARAT

(Before Hon'ble Mr. Justice G.T. Nanavati &
Hon'ble Mr. Justice S.D. Dave)

WT Reference Nos. 1 to 3 of 1979

Commissioner of Wealth-tax

vs.

Dilawar Syndicate (P) Ltd.

For the Appellant	:	**Mihir Thakore**
For the Respondent	:	**None**
Decided on	:	21.10.1992

WEALTH-TAX RETURNS FILED LATE — A.Ys. 1963-64 to 1970-71 — Returns filed on behalf of non-resident as an agent — Penalties for late filing levied — Assessee pleading no notice for treating the assessee as an agent served — Held, assessee throughout filing return as an agent — No need for the Assessing Officer to issue notice treating the assessee as an agent — Penalties rightly levied.

Wealth-tax Act, 1957 — Sections 18(1)(a) & 22.

FACTS

Husain Kasam Dada, Mommad Sidqu Maji Rahimtulla and Valimohmed Rahimtulla are neither citizens of India nor residing in India. However, they had received income in India from the advances made to or deposits kepts with Dilawar Syndicate (P) Ltd., Junagadh. On 14.5.1971, Dilawar Syndicate (P) Ltd. filed returns of all the three assessees for the A.Ys. 1963-64 to 1970-71. While passing the assessment orders, the WTO also passed orders for issuance of show cause notices u/s 18(1)(a) of the Wealth-tax Act, 1957 for late submission of the returns. Those notices were not replied to and in absence of any explanation on behalf of the assessees, orders for levying penalty were passed. The AAC dismissed the appeals and confirmed the orders passed by the WTO. The Tribunal held that issuance of notices u/s 22(2) was necessary condition precedent before treating Dilwar Syndicate (P) Ltd. as agent of the assessese and as no such notice was issued, even though they can be regarded as agent of the assessees, the penalty proceedings cannot be said to have been validly initiated. Taking this view, the Tribunal allowed the appeals and ordered deletion of penalty imposed upon the assessee.

DECISION

The Hon'ble Court held that the Assessing Officer had no occasion to treat Dilawar Syndicate (P.) Ltd. as agent because Dilwar Syndicate (P) Ltd. had acted as agent of the assessees by filing returns voluntarily and represented the assessees throughout the assessment proceedings. In fact, they had

described themselves as agent of the assessees and, thus, admitted that they were the agent of the assessees. The Hon'ble Court was, therefore, of the opinion that in these cases it was not at all necessary for the Assessing Officer to issue notices to the respondents u/s 22(2) as the cases were governed by section 22(1): The respondents u/s 22(2) as the cases were governed by section 22(1). The respondents having voluntarily filed the wealth-tax returns on behalf of the assessees, admitted their status as their agent and, therefore, it was not necessary for the WTO to give any further notice to them u/s 22(2) before levying any penalty upon the assessees. The reference was thus decided against the assessees.

Case referred to :

Jadavji Narshidas & Co. vs. CIT (1957) 31 ITR 1 (Bom)

Full text of the Judgment is given below :

JUDGMENT

(G.T. Nanavati, J.)

Though these references pertain to three different assessees and every assessment year, they were heard together and disposed of by the common judgment as the questions referred to this Court are identical.

From the facts stated by the Tribunal and on the basis of the record, it appears the Husain Kasam Dada, assessee in WTR No. 1 of 1979, Mommad Sidiqu Maji Rahimtulla, assessee in WTR No. 2 of 1979 and Valimohmed Rahimmulla, assessee in WTR No. 3 of 1979 are neither citizens of India nor residing in India. However, they had received income in India from the advances made to or deposits kepts with Dilawar Syndicate (P) Ltd., Junagadh. On 14.5.1971, Dilawar Syndicate (P) Ltd. filed returns of all the three assessees for the A.Ys. 1963-64 to 1970-71. While passing the assessment orders, the WTO also passed orders for issuance of show cause notices u/s 18(1)(a) of the Wealth-tax Act, 1957 ('the Act') for late submission of the returns. Those notices were not replied to and in absence of any explanation on behalf of the assessees, orders for levying penalty were passed. It appears from the orders levying penalty that even though the assessees were informed about the date fixed for hearing of the assessment proceedings, nobody had appeared on behalf of the assessees. Aggrieved by the orders imposing penalty, the assessees through their agent Dilawar Syndicate (P.) Ltd. preferred appeals before the AAC. What was contended before the AAC was that the deposits made by the assessees were invested with Kathiawar Industries Ltd., and, therefore, they believed that it was not their obligation to file wealth-tax returns. In May 1971, it was brought to their notice by the tax consultant that they were under statutory obligation to pay wealth-tax as agent of these assessees and it was for that reason that they filed the returns. It was also contended that before imposing penalty show-cause notices were not served legally on the legally authorised agent.

It was further contended that there was no deliberate or intentional default on their part and, therefore, the order of penalty was not legal and sustainable.

The AAC held that as returns were filed by Dilawar Syndicate (P.) Ltd. voluntarily acting as an agent of the assessee, section 22(1) of the Act applied and it was the statutory obligation of the appellant, viz, Dilawar Syndicate (P.) Ltd., to file wealth-tax returns within time. As regards the contention that show-cause notices were not served, the AAC held that notices were served upon B.M. Ratia of Dilawar Syndicate, as authorised representative of the assessees. Ratia had represented the assessees during the assessment proceedings and, therefore, it was not correct to say that show-cause notice were not properly served. He also held that Dilawar Synldicate (P.) Ltd. had acted as agent of the assessees right from 1946 and, therefore, it was not correct to say that only when their attention was drawn by their tax consultant that they realised that they had filed the returns. He, therefore, dismissed the appeals and confirmed the orders passed by the WTO.

Aggrieved by the orders passed by the AAC, Dilawar Syndicate (P.) Ltd. preferred eight separate appeals before the Tribunal for each of the three assessees as the orders pertained to eight different assessment years, viz., assessment years 1963-64 to 1970-71. The Tribunal held that issuance of notices under section 22(2) was necessary condition precedent before treating Dilawar Syndicate (P.) Ltd. as agent of the assessees and as no such notice was issued, even though they can be regarded as agent of the assessees the penalty proceedings cannot be said to have been validly initiated. Taking this view, the Tribunal allowed the appeals and ordered deletion of penalty imposed upon the assessees.

The revenue, therefore, preferred 24 separate applications for referring the following three questions to this Court :

"1. Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in deleting the penalties imposed under section 18(1)(a) of the WT Act, 1957?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that without service of notice as required under section 22(2) of Wealth-tax Act no person could be held liable to file return of net wealth of a person residing outside India ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that a person who being in possession or custody of any asset of a person residing outside India filed returns of net wealth of the person residing abroad without receipt of notice under section 22(2) of Wealth-tax Act was not liable to be penalised under section 18(1) of the W.T. Act ?"

As the said questions do arise out of its orders, the Tribunal has referred the same to this Court for its opinion.

What is contended by the learned counsel for the revenue is that the Tribunal has committed an error of law in holding that without service of notice under section 22(2) of the Act, no person could be held liable to file return of net wealth of a person residing outside India and that he cannot be made liable to pay penalty under section 18(1)(i).

Before we refer to the relevant provisions of law, it would be profitable to again emphasises the facts which are not in dispute. Dilawar Syndicate (P.) Ltd. had voluntarily filed wealth-tax returns. During the wealth-tax proceedings, they had represented the assessee by acting as their agent. They had not raised any contention during the assessment proceedings that they were not agent of the assessees. It also appears that tax was paid by them on behalf of the assessees. The person who represented them during the assessment proceedings was served with the show-cause notices whereby penalty proceedings were initiated.

We may now turn to section 22. It becomes apparent from sub-section (1) thereof that tax may be levied upon and recovered from an agent of the person liable to pay tax under the Act (sic) who is residing outside India. The agent of the assessee is deemed to be, for the purposes of the Act, an assessee in respect of such tax. Sub-section (2) reads as under :

> "(2) Any person employed by or on behalf of a person referred to in sub-section (1) or through whom such person is in the receipt of any income, profits or gains or who is in possession or has custody of any asset of such person an upon whom the Assessing Officer has caused a notice to be served of his intention of treating him as the agent of such person shall, for the purposes of sub-section (1), be deemed to be the agent of such person."

Persons who are not employed as agents by their principals can also be regarded as agents, according to this sub-section. It specifies different persons who can be regarded as agents of the assessee. It provides that (i) any person employed by or on behalf of a person liable to pay tax under the Act but in residing outside India; (ii) any person through whom such person that is person residing outside India liable to pay tax under the Act, is in receipt of any income, profits or gains; or (iii) any person who is in possession or has custody of any asset of such person that is person residing outside India liable to pay tax in India. However, this sub-section further provides that before treating any such person as an agent, the Assessing Officer is satisfied about the conditions necessary for treating any such person as agent, he can treat such person as gent and thereafter he is to be deemed as agent of the person residing outside India but who is liable to pay tax under the Act. Thus, sub-section (2) provides who can be deemed to be an agent of non-resident assessees. These are the persons who even

though they are not appointed as agents of the principals, that is, assessees, may be treated as assessees. If such persons are to be treated as agents, the requirements of giving notice will become applicable. There is no such requirement of issuing a notice to a persons who is otherwise appointed as agent or who has acted agent and who has been accepted as agent of the assessee. Whereas sub-section (1) refers to an agent who is either appointed or accepted as agent, sub-section (2) indicates who can be treated as an agent.

As pointed out above, in this case, the Assessing Officer had no occasion to treat Dilawar Syndicate (P.) Ltd. as agent because Dilawar Syndicate (P.) Ltd., had acted as agent of the assessees by filing returns voluntarily and represented the assessees throughout the assessment proceedings. In fact, they had described themselves as agent of the assessees and, thus, admitted that they were the agent of the assessees. We are of the opinion that in these cases, it was not at all necessary for the Assessing Officer to issue notices to the respondents under section 22(2) as the cases were governed by section 22(1). The view which we are taking is also to some extent, supported by a decision of the Bombay High Court in the case of *Jadavji Narshidas & Co. vs. CIT* (1957) 31 ITR 1. This was a case under the Indian Income-tax Act, 1922. Though the relevant provisions of that Act and the provisions with which we are concerned cannot be said to be identical, the observations made in that decision can usefully be applied to this case also. Therein, the High Court has held that as the assessee made the return without being called upon to submit a return by a notice under section 22(2) and in that return he admitted the status as an agent of the non-resident, non-service of notice was of no consequence. The High Court observed that once he filed the reun as agent, without being called upon to do so, he admitted his status as agent. The Bombay High Court also held that the provision requiring notice to be given to such a person is a procedural requirement and not a condition precedent to initiation of the proceedings.

In this case also, it can be said that the respondents having voluntarily filed the wealth-tax returns on behalf of the assessee, admitted their status as their agent and, therefore, it was not necessary for the Wealth-tax Officer to give any further notice to them under section 22(2) before levying any penalty upon the assessees.

In that view of the matter, question No. 1 will have to be answered in the negative, that is, in favour of the revenue and against the assessees. Question No. 2 is also answered in the negative, that is, in favour of the revenue and against the assessees. Question No. 3 is also answered in the negative, that is, in favour of revenue and against the assessees. There will be no order as to costs.

As 8 separate appeals were filed in each case and 8 separate reference

were made in each case, the Tribunal ought to have made separate references in respect of each of the assessment yeas. As that has not been done by the Tribunal, we direct the office to give separate numbers to the references treating reference No. 1 as reference for the assessment year 1963-64, and like wise, to give separate numbers to other references for different years.

Reference answered in the negative.

(1995) 126 Taxation 195 (Guj.)

IN THE HIGH COURT OF GUJARAT

(Before Hon'ble Mr. Justice N.B. Shah & Hon'ble Mr. Justice N.N. Mathur)

Special Civil Application No. 259 of 1980

Garden Silk Weaving Factory

vs.

Commissioner of Income-tax

For the Appellant	:	**J.P. Shah**
For the Respondent	:	**M.R. Bhatt**
Decided on	:	27-6-1994

WAIVER OF PENALTY U/S 273A — Penalty for concealment levied and confirmed by the Tribunal — Assessee making payment of the amount — CIT rejecting application since penalty already paid — Held, the word 'payable' in section 273A meaning liable to pay a particular sum — Even if penalty paid provisions of section 273A applicable — Rejection by the CIT on irrelevant ground — CIT directed to consider application afresh.

Income-tax Act, 1961 — Section 273A.

FACTS

For the A.Y. 1968-69, the petitioner submitting a return of income. Before assessment proceedings started, petitioner making a petition for settlement to the CIT. Assessment completed at Rs. 11,14,179 which was reduced in appeal to Rs. 7,21,238/-. A penalty of Rs. 7,92,820 was confirmed by the Tribunal. Thereafter petitioner filed an application u/s 273A(4) for waiver of above penalty. The application was rejected by the CIT on the ground that petitioner had already paid the penalty and, therefore, section 273(4) was not available to the assessee.

DECISION

The Hon'ble court held that in their view the ground for rejection of petitioner's application that it has already paid the amount of penalty and, therefore, genuine hardship existed to the assessee cannot be said to be valid reason for rejection of the application u/s 273(4). In the context of

section 273A the word 'payable' would mean that the assessee is liable to pay a particular sum as penalty. Even if the liability to pay penalty is discharged it would not mean that he is not entitled to get relief u/s 273A otherwise no assessee would pay the penalty till the proceedings u/s 273A are over. The CIT, therefore, rejected the application on totally irrelevant ground. The order of the CIT was set aside with a direction to pass fresh order.

Cases referred to :

1. *Smt. Kherunissa Allibhai vs. CIT* (1978) 113 ITR 443 (Guj.)
2. *New Delhi Municipal Committee vs. Kalu Ram* (1976) 3 SCC 407 (SC)

Full text of the Judgment is given below :

JUDGMENT

(N.B. Shah, J.)

For the assessment year 1968-69 the petitioner submitted return of income of Rs. 3,83,300 on 17-10-1968. Before the assessment proceedings started, the petitioner made an application dated 29-3-1971 for settlement to the Commissioner, disclosing voluntarily an amount of Rs. 3,00,000 being profit on sale of import licence and on the next day, i.e., on 30-3-1971 filed a revised return including the above voluntarily disclosed income. The ITO did not accept that the import licence was sold for Rs. 3,00,000 and he estimated the profit on sale of yarn and made additions in profit and investment said to have been made in disposal of import licence. He estimated the income at Rs. 11,14,179. On appeal, the AAC reduced the said amount to Rs. 7,21,438. The order passed by the AAC was confirmed by the Tribunal.

Thereafter, the IAC passed an order dated 3-3-1976 under section 271(1)(c) imposing penalty of Rs. 11,02,000. The Tribunal reduced the penalty to Rs. 7,92,820. The petitioner paid the amount of penalty and interest over it on 1-9-1977.

Thereafter the petitioner filed an application dated 28-9-1977 under section 273A(4) of the Income-tax Act, 1961 for waiver of the above penalty. In the said application it was, *inter alia*, pointed out by the petitioner that the petitioner and its partners had already suffered the financial liability of Rs. 18,90,100 in respect of the transaction. It was prayed that the Commissioner may exercise the power under section 273(4) and waive the penalty as otherwise it would cause genuine hardship to the petitioner and it was also pointed out that the petitioner had co-operated in all inquiry relating to the assessment and in the proceeding for the recovery if any amount due from it. The petitioner also pointed out the financial hardship which would be caused to it by imposition of the said penalty.

That application was rejected by the order dated 18-12-1979 (Annexure "K") passed by the respondent under Section 273A(4) on the ground that the petitioner had already paid the penalty and, therefore, section 273(4) was not available to him. The Commissioner arrived at the conclusion that the words used in sub-section (4) are 'any penalty payable' which would indicate that when the amount of penalty is outstanding then the power of waiver of penalty can be exercised. That order (Annexure "K") is challenged by filing this petition.

In our view the ground for rejection of the petitioner's application that it has already paid the amount of penalty and, therefore, there is no genuine hardship caused to the assessee, cannot be said to be a valid reason for rejection of an application under section 273A(4). By considering the scheme of section 273A and, particularly sub-section (4), it is apparent that if the penalty which is imposed is paid, it would definitely indicate that the assessee has co-operated in the proceeding for recovery of any amount due for him and it would be a factor which is required referring to sub-section (4) of section 273A which empowers the Commissioner to reduce or waive the amount of penalty payable by the assessee. Sub-section (4) reads as under:

> "273A(4) Without prejudice to the powers conferred on him by any other provision of this Act, the Commissioner may, on an application made in this behalf by an assessee, and after recording his reasons for so doing, reduce or waive the amount of any penalty payable by the assessee under this Act or stay or compound any proceeding for the recovery of any such amount, if he is satisfied that
>
> (i) to do otherwise would cause genuine hardship to the assessee, having regard to the circumstances of the case; and
>
> (ii) the assessee has co-operated in any enquiry relating to the assessment or any proceeding for the recovery of any amount due from him."

Reading this sub-section it is clear that for grant of relief, the Commissioner is required to consider whether (i) in the facts of the case there would be genuine hardship to the assessee if relief is not granted, assessment or any proceeding for the recovery of any amount due from him.

(ii) the assessee has co-operated in any inquiry relating to the assessment or any proceedings for the recovery of any amount due from him. That would mean that clause (i) of sub-section (4) requires that the Commissioner should verify that the assessee has co-operated (a) in any inquiry relating to the assessment or (b) in any proceeding for the amount due from him. The second part of clause (ii) would certainly indicate that if he has co-operated in recovery of the amount of penalty payable by him, then it cannot be said that the Commissioner would have no jurisdiction to entertain the assessee's application. In our view, the conditions precedent for exercise of quasi-judicial power under section 273A(4) are the two-objective criteria

mentioned in clauses (i) and (ii) and not whether the assessee has or has not paid penalty. As observed by the Division Bench of this Court in the case of *Smt. Kherunissa Allibhai vs. CIT* (1978) 113 ITR 443 (Guj.), the whole concept under section 273A is that the mitigating circumstances or certain circumstances specified in the section for the purpose of getting the penalty waived or reduced; when the assessee approaches the Commissioner under section 273A, he does not dispute his liability to pay the penalty; all that he says is that he should be given the relief of reduction or waiver by the fact that the conditions specified in section 273A are satisfied. So, what is meant paid meant in the context of the scheme of section 273A is, whether mitigating circumstances for waiver or deduction of the penalty are satisfied or not. If such conditions are satisfied, it would not mean that he is not entitled to get relief. Further, considering the scheme of section 273A, the phrase 'reduce or waive the amount of any penalty payable by the assessee under this Act' would cover case where penalty is payable or paid by the assessee. Where considering the word 'payable' used in section 7(1) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 the Supreme Court in the case of *New Delhi Municipal Committee vs. Kalu Ram* (1976) 3 SCC 407, has observed that the word 'payable' somewhat indefinite in import and its meaning must be farthered from the context in which it occurs; 'payable' generally means that which should be paid. In the context of Section 273A the word 'payable' would mean that assessee is liable to pay a particular sum as penalty. Even if the liability to pay penalty is discharged, it would not mean that he is not entitled to get relief under section 273A otherwise no assessee would pay the penalty till the proceedings under section 273A are over.

In our view, as the Commissioner has rejected the application of the petitioner on a totally irrelevant ground, the order passed by him requires to be quashed and set aside.

In this result, the petition is allowed. The impugned order dated 18-12-1979 (Annexure "K") passed by the respondent is quashed and set aside. The Commissioner is directed to decide the application filed by the petitioner afresh on merits in accordance with law. Rule made absolute to the aforesaid extent with no order as to costs.

(1995) 126 Taxation 199 (P&H)

IN THE HIGH COURT OF PUNJAB & HARYANA

(Before Hon'ble Mr. Justice R.P. Sethi &
Hon'ble Mr. Justice Sat Pal)

Income-tax Case No. 162 of 1994

Commissioner of Income-tax
vs.
M/s Lakshmi Printing Co.

For the Appellant	:	**R.P. Sawhney with Aradhana Sawhney**
For the Respondent	:	**None**
Decided on	:	30-9-1994

REFERENCE — Tribunal refusing to refer the matter in view of full bench judgment of the jurisdictional High Court — Assessee filing petition for a direction to refer the matter — Revenue praying that the judgment relied upon subject matter of appeal before Supreme Court — Held, a mere admission of appeal by the apex court without staying the operation of judgment cannot be held to be a question of law — Tribunal rightly rejected the reference application of the revenue.

Income-tax Act, 1961 — Section 256(2).

FACTS

A prayer is made that a direction be issued to the respondent — Tribunal to make a reference to this Court regarding the alleged question of law formulated before it. In view of the Full Bench judgment of five Judges of this Court in M/s Sourin Knit Works 199 ITR 679, the present petition is not maintainable as the point of law sought to be referred stands already settled by the aforesaid judgment. The revenue pleaded after the grant of Special Leave Petition filed by the revenue, a direction is required to be issued to the Tribunal for making reference to this Court, as according to them the admission of the appeal in the Supreme Court by itself makes a question, the subject matter of the appeal, to be an important question of law.

DECISION

The Hon'ble Court held that the High Court can require the making of reference upon a question of law which has not been settled or decided by it or by the Apex Court. In view of the Full Bench judgment of this Court in *M/s Sourin Knit Work's* case, no further action is required to be taken. The mere admission of appeal in the Hon'ble Supreme Court without staying the operation of the judgment of this court cannot be held to be a question of law requiring the direction for making a reference in terms of sub-section (2) of section 256 of the Act.

Cases referred to :

1. *Empire Industries Ltd. vs. UOI,* 162 ITR 846 (SC)
2. *Assessing Authority-cum-Excise & Taxation Officer, Gurgaon & Another vs. East India Cotton Mfg. Co. Ltd.* 48 STC 239 (SC)
3. *CIT vs. Shiv Parshad* 146 ITR 397 (P&H)
4. *CIT vs. Indian Press Exchange,* 176 ITR 331
5. *CIT vs. Kerala SRTC Trust* 167 ITR 383
6. *CIT vs. Chander Bhan Harbhajan Lal* 60 ITR 188 (SC)

Full text of the Judgment is given below :

JUDGMENT

By means of this application filed under sub-section 2 of Section 256 of the Income-tax Act (for short the 'Act') a prayer is made that a direction be issued to the respondent—Tribunal to make a reference to this Court regarding the alleged question of law formulated before it. In view of the Full Bench judgment of five Judges of this Court in *M/s Sourin Knit Works* 199 ITR 679, the present petition is not maintainable as the point of law sought to be referred stands already settled by the aforesaid judgment. Mr. R.P. Sawhney, Advocate, submits that after the grant of Special Leave Petition filed by the Revenue, a direction is required to be issued to the Tribunal for making reference to this Court, as according to him the admission of the appeal in the Supreme Court by itself makes a question, the subject matter of the appeal, to be an important question of law. The learned counsel has also relied upon 1966 ITR 619 and 114 ITR 411 in support of his submissions and to urge that while deciding a petition under sub-section (2) of Section 256 of the Act the Court should not be concerned with the ultimate result which is likely to emerge.

It is acknowledged position of law that the powers exercised under sub-section (2) of Section 256 of the Act are advisory in nature. Being a special jurisdiction, the High Court can require the making of reference on a question of law which has not been settled or decided by it or by the Apex Court. In view of the Full Bench judgment of this Court in *M/s Sourin Knit Work's* case (supra) no further action is required to be taken. The mere admission of appeal in the Hon'ble Supreme Court without even staying the operation of the judgment of this Court cannot be held to be a question of law requiring the direction for making a reference in terms of sub-section (2) of section 256 of the Act. The reliance of the learned counsel on the aforesaid two judgments is misplaced.

A Division Bench of this Court in *CIT vs. Shiv Parshad,* 146 ITR 397 held :

> "The Tribunal was right in declining to refer the case for the opinion of the High Court because the Court had already expressed an opinion

on that law point and had dissented from the view taken by the Allahabad High Court and no useful purpose would be served by issuing a writ of mandamus under s. 256(2) because it had not been shown to the Court that the opinion already expressed by the Court in *Anand Sarup's* case was erroneous. Further, it would be a futile exercise for the Tribunal to refer the matter to the High Court and if Tribunal declined, then to issue a mandamus to the Tribunal to refer the matter, because in either eventuality, the answer would be a forgone conclusion. In such a situation, it should be deemed that the case was stated to the High Court and following the earlier decision the High Court had answered the question on those lines."

To the same effect are the judgments in *CIT vs. Indian Press Exchange,* 176 ITR 331 and *CIT vs. Kerala SRTC Trust* 167 ITR 383.

The Supreme Court in *CIT vs. Chander Bhan Harbhajan Lal,* 60 ITR 188 held that "where the question of law raised was not substantial and the answer to the question was self evident, the Court was bound to require the Tribunal to refer the question." In the instant case, the answer to the question sought to be referred is self evident in view of the judgment of the Full Bench in *M/s Sourin Knit Works'* case (supra).

No merit dismissed.

(1995) 126 Taxation 201 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Justice Y.R. Meena & Hon'ble Justice Mr. V.K. Singhal)

DBIT Reference No. 95 of 1994

Commissioner of Income-tax

vs.

M/s Agarwal Flooring Stone Company

For the Appellant	:	**G.S. Bapna**
For the Respondent	:	**None**
Decided on	:	6-2-1995

REFERENCE — Assessee claiming investment allowance and higher depreciation on dumpers — Tribunal holding dumpers capable of being used both as mining machinery and as road transport vehicle — Matter sent back to record finding whether dumpers used as road transport or purely as mining machinery — Revenue seeking reference against the directions to find further facts — Held, directions of the Tribunal fully justified — No question of law arose — Application dismissed.

Income-tax Act, 1961 — Section 256(2).

FACTS & DECISION

Assessee is engaged in the business of exploitation of mines, extraction of stones and sale thereof. The assessee claimed investment allowance and higher rate of depreciation on dumpers employed by it. The Tribunal found that the claim of the assessee could not either be allowed or rejected automatically merely because they were called dumpers. Dumpers are capable of being used as a mining machinery as well as road vehicle. The Tribunal, therefore, remanded the matter with a direction to record a finding on this issue. Being aggrieved, the revenue sought reference which was rejected by the Tribunal. The revenue approached the High Court for direction to the Tribunal u/s 256(2). The Hon'ble Court held that unless a clear finding was recorded as to what use the dumpers were put to, the matter could not be decided. The Tribunal was, therefore, right in remanding the matter for finding further facts. No question of law arose and the application of the revenue was dismissed.

Full text of the Judgment is given below :

JUDGMENT

By this application u/s 256(2) of the Income-tax Act, 1961 it is prayed that it may be directed to refer the following question of law alongwith the statement of the case for the opinion of this Court :

> "Whether on the facts and in the circumstances of the case, and in law the Tribunal was justified in directing the Assessing Officer to find out whether during the year under consideration, the dumpers were used by the assessee as road transport vehicles or whether they were used purely as mining machineries for allowing investment allowance depreciation as per the provisions despite the fact that the ITAT in A.Yr. 1981-82 vide order in ITA No. 561/JP/1988 dated 11-9-1991 in this very case has held that the dumpers are road vehicles and are not entitled to investment allowance and higher depreciation?"

The assessee is engaged in business of exploitation of mine, extraction of stones and sale thereof. *Inter alia* the assessee claimed higher depreciation and investment allowance on the dumpers, which was disallowed by the Assessing Officer and even in appeal. In second appeal before the Tribunal the Tribunal has referred its order in the case of M/s Nav Bharat Construction Co., wherein it was observed that investment allowance and additional depreciation on dumpers cannot be either allowed or rejected automatically merely because they are called dumpers. The dumpers are capable of being used both as mining machinery and machinery as road transport vehicles, but it was for the assessee to establish that they were used exclusively as mining machinery and not as road transport vehicles. The assessee will be entitled for investment allowance or additional depreciation on dumpers only if the dumpers used as mining machinery. The Tribunal has referred the decision of this Court in the case of *Kumar Transport Pvt. Ltd.* It

is further observed by the Income-tax Appellate Tribunal in the year under consideration that no specific material has been brought on record. Therefore the matter was restored to the file of the Assessing Officer to make necessary enquiry to find out whether in the year under consideration the dumpers were used by the assessee as road transport vehicles or whether they were used purely as mining machinery.

When necessary facts relevant to the issue; whether the dumpers are road transport vehicles or form part of the machinery are not brought on record. No enquiry has been made by the assessee itself. In such circumstances the Tribunal was fully justified in remitting the matter back to the Assessing Officer to make necessary enquiries to ascertain whether the assessee is entitled for investment allowance or additional depreciation. No purpose will be served in calling the question for our opinion as we are agreed with the view taken by the Tribunal on the question proposed.

In the result, the reference application u/s 256(2) is dismissed.

(1995) 126 Taxation 203 (SC)

IN THE SUPREME COURT OF INDIA

(Before Hon'ble Justice Mr. B.P. Jeevan Reddy & Hon'ble Justice Mr. G.T. Nanavati)

Civil Appeal No. 2636 of 1977 ETC

Commissioner of Income-tax

vs.

Ajanta Electricals, Punjab etc.

For the Appellant : **J. Ramamurthy**

Decided on : 2-5-1995

EXTENSION OF TIME TO FILE THE RETURN — A.Y. 1966-67 — Application for extension filed late — Penalty for late filing of return deleted by High Court — Held, assessee entitled to file application for extension even after period for filing return allowed u/s 139(2) expired — Application for extension of time valid — Penalty for late filing rightly deleted.

Income-tax Act, 1961 — Section 139(2).

FACTS

In respect of A.Y. 1966-67, notices u/s 139(2) were issued to the assessee to file the return. The return was required to be filed by 19-6-1966 but the return was filed on 27-6-1967. The returns were late and the ITO initiated penalty proceedings for late filing of the returns. Assessee pleaded that they had made application for extension of time. The first application was made on 29-6-1966. The ITO is of the view that since application seeking extension of time was not filed within the time

allowed by notice u/s 139(2), such belated applications could not be entertained. In this view of the matter the ITO imposed penalty for late filing of return. The AAC on appeal cancelled the penalty imposed. The Tribunal, however, agreed with the view of the ITO that belated applications cannot be regarded as legal and valid and allowed the appeal of the department. On reference to High Court, the Hon'ble Court was of the view that proviso to section 139(2) does not contain any limitation to the effect that an application should be filed within the stipulated time and application for extension of time could be made even after the expiry of that period. It is against this decision of the High Court that the Revenue has come in appeal.

DECISION

The Hon'ble Apex Court held that there are no words of limitation in Section 139(2) to the effect that no application could be filed after the period allowed had expired. As was stated earlier, it was a procedural provision. The limit of thirty days was not intended to be final as discretion was given to the ITO to extend that date. The ITO could have been called upon to exercise that discretion for proper reasons. No fetters were placed upon the discretion of the ITO as regards the number of times he could extend the date or the period for which he could extend it. There is no justification for reading into the section any limitation to the effect that no application could be made after the time allowed had expired. There was no good reason to construe the section so narrowly. Though the Civil Procedure Code by itself does not apply to the proceedings under the Income-tax Act, there is no reason why a principle of procedure evolved for doing justice to a party to the proceeding cannot be called in aid to while interpreting a procedural provision contained in the Act. The Hon'ble Apex Court held that the view taken by the Punjab & Haryana High Court in these cases and by the Calcutta High Court in *Sunderdas Thackersay & Bros. vs. CIT* (137 ITR 646) is correct and the contrary view taken by the Andhra Pradesh High Court in *T. Venkata Krishnaiah & Co. vs. CIT* (93 ITR 297), Gauhati High Court in *Assam Frontier Veneer & Saw Mills vs. CIT* (104 ITR 479) and the Patna High Court in CIT vs. S.P. Viz Construction Co. (165 ITR 732) is not correct. The applications made by the assessees u/s 139(2) for extension of time after the expiry of the time allowed were maintainable and, therefore, valid. The appeal of the department was dismissed.

Cases referred to :

1. *Sunderdas Thackersay & Bros. vs. CIT* 137 ITR 646 (Cal.)
2. *Mahanth Ram Das vs. Ganga Das* AIR 1961 SC 882
3. *T. Venkata Krishnaiah & Co. vs. CIT* 93 ITR 297 (AP)
4. *CIT vs. S.P. Viz Construction Co.* 165 ITR 732 (Pat.)
5. *Assam Frontier Veneer & Saw Mills vs. CIT* 104 ITR 479 (Gau.)

Full text of the Judgment is given below :

JUDGMENT

(G.T. Nanavati, J.)

These four appeals arise out of the judgment delivered by the Punjab and Haryana High Court in I.T. Reference Nos. 17, 19, 44 and 45 of 1974. A common question which arises for consideration in these appeals is whether an application made under section 139(2) of the Income-tax Act for extension of time for filing of the return of income, after the expiry of the stipulated period could be regarded as legal and valid.

The respondent in Civil Appeal No. 2636 of 1977 is a partnership firm and the respondents in Civil Appeal Nos. 2499-2501 of 1977 are its partners. In respect of the assessment year 1966-67 individual notices under Section 139(2) were issued to the firm and its three partners requiring them to furnish returns of their income within 30 days from the date of service of the notice. The notice was served upon the firm on 18-5-1966 and the partners were served on 24-6-1966. Therefore, the return was required to be filed by the firm on or before 19-6-1966 and the partners had to file their returns on or before 24-7-1966. All of them submitted their returns on 27-6-1967.

At the time of completing the assessment the ITO initiated proceedings under Section 271(1)(a) for levying penalty as there was delay in filing the return without reasonable cause. In those proceedings the assessees pointed out that they had made applications to the ITO on 29-6-1966 and 31-12-1966 for extending the time upto 31-12-1966 and 31-3-1967 respectively and contended that no penalty should be imposed upon them as they reasonably believed that those applications were granted since they were not rejected by the ITO. The ITO did not accept this contention as in his view no authentic evidence was produced by the assessees in that behalf and also because such applications had to be made before the expiry of the due date for the filing of the returns. He, therefore, passed order levying penalty upon them. The assessees went in appeal to the Appellate Assistant Commissioner. He recorded a finding that applications dated 29-6-1966 and 31-12-1966 were made by the assessees and that the firm had made one more application dated 15-5-1967 for extension of time upto 30-6-1967. He accepted the contention of the assessees that they had reasonably presumed that their applications were granted as they were not rejected and thus there was reasonable cause for the delay in filin the returns, till the last date upto which extension was sought for. He, therefore, cancelled the penalty imposed upon the firm and restricted the penalty imposed upon the partners to the period for which no reasonabl cause was shown. The Revenue preferred appeals against those orders tc the Tribunal. It held that belated applications cannot be regarded as legal and valid, allowed the anneals and restored the orders passed bv the ITO.

At the instance of the assessees the Tribunal made the reference to the High Court. Main judgment was delivered by the High Court in I.T. Reference No. 17 of 1974. The High Court held that as the proviso to section 139(2) does not contain any limitation to the effect that an application for extension should be filed within the stipulated time, an application for extension of time can be made even after the expiry of that period. The Form prescribed for making an application for extension of time also indicates that an application for that purpose can be filed even after the expiry of the due date. It, therefore, decided the question in favour of the assessees.

What is contended by the learned counsel for the Revenue is that the High Court has not interpreted the proviso to section 139(2) correctly. It is submitted that the Income Tax Act is a complete Code by itself and in the absence of a specific provision in the Act or the rules made thereunder, it should have been held that making an application for extension of time is not permissible after the expiry of the period either specified originally or extended by the ITO for the filing of the returns; and, therefore, the belated applications filed by the assessees were invalid.

Section 139(2), which was deleted with effect from 1-4-1989, at the relevant time read as under :-

> "(2) In the case of any person who, in the Income-tax Officer's opinion, is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income-tax Officer may, before the end of the relevant assessment year, serve a notice upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed;
>
> Provided that on an application made in the prescribed manner the Income-tax Officer may, in his discretion, extend the date for the furnishing of the return, and when the date for furnishing the return, whether fixed originally or on extension, falls beyond the 30th day of September or as the case may be, the 31st day of December of the assessment year, the provisions of sub-clause (iii) of the proviso to sub-section (1) shall apply."

It provided for the manner in which a person, who, in the opinion of the ITO, was assessable, could be directed to furnish a return of his income and the manner in which he had to file the return. A notice was required to be given to such person and he had to file the return within thirty days from the date of service of the notice. The period so fixed could be extended by the ITO, if an application for that purpose was made in the prescribed manner. The proviso enabled the ITO to extend the date for furnishing the return and laid down the procedure for moving the ITO for that purpose.

The manner of making such an application was prescribed by Rule 13. The form prescribed was Form No. 6. It reads as under :

> "Form No. 6 : Under Section 139(1)/(2)/(3) of the Income-tax Act, 1961.
>
> I/we have to file the return of my/our income
>
> in income of........in respect of which I/we are assessable
>
> for the assessment year commencing on 1st April, 19..
>
> before 19 . For the reasons given below, it is not possible / has not been possible
>
> for me/us to file the return before the said date."

We are also referring to this prescribed form because the High Court after referring to it, has observed that "the prescribed form clearly shows that the application for extension of time may be filed even after the expiry of the period prescribed for filing the return." The Calcutta High Court in *Sunderdas Thakersay & Bros. vs. CIT* 137 ITR 646 has also taken the same view.

Even when the ITO extended the date, if it fell beyond the dates mentioned in the proviso, the provision of sub-clause (iii) of the proviso to sub-section (1) became applicable and interest at the rate of 6 per cent became payable as stipulated in that provision. The object of the provision was to see that the assessee did not gain in an way by postponement of furnishing the return with the hope that the could postponed payment of tax to a later date and have the advantages of utilising that amount during that period, as he was made to pay interest on the amount of tax found payable. At the same time, it was provided in sub-section (8) that the ITO could in prescribed cases and under prescribed circumstances, reduce or waive the interest payable. Moreover, a person who failed to furnish the return within time allowed under Section 139(2) was at the relevant time not only liable to pay interest but also penalty under section 271 and fine under Section 276.

In this context, the question whether a belated application could be regarded as valid or not has to be considered. As rightly pointed out by the Punjab and Haryana High Court while deciding these cases under section 256(2) and by the Calcutta High Court in *Sunderdas Thackersay & Bros.* (supra), there are no words of limitation in Section 139(2) to the effect that no application could be filed after the period allowed had expired. As we have stated earlier, it was a procedural provision. The limit of thirty days was not intended to be final as discretion was given to the ITO to extend that date. The ITO could have been called upon to exercise that discretion for proper reasons. No fetters were placed upon the discretion of the ITO as regards the number of times he could extend the date or the period for

which he could extend it. It is conceded that repeated applications could be made within the time allowed, in view of the clear indication to that effect in Form No. 6, by the use of words "it has not been possible". If it was intended that the application for extension of time under Section 139(2) was to be made within the time allowed originally or within the extended time then the words "it has not been possible" were not at all necessary and the words "it is not possible" would have been sufficient. Though the rule cannot affect, control or derogate from the section of the Act, so long as it does not have that effect, it has to be regarded as having the same force as the section of the Act. If Section 139(2) is read alongwith Rule 13 and Form No. 6 it becomes clear that an application for extension could be made even after the period allowed originally or as a result of extension granted had expired. Keeping in mind the object of giving discretion to the ITO and the consequences that were to follow from not filing the return within time, we see no justification for reading into the section any limitation to the effect that no application could be made after the time allowed had expired. We see no good reason to construe the section so narrowly.

We cannot accept the contention raised on behalf of the Revenue that the word 'extend' in the proviso to Section 139(2) implies that at the time of making the application the time allowed should not have expired. Though the Civil Procedure Code by itself does not apply to the proceedings under the Income-tax Act, we see no reason why a principle of procedure evolved for doing justice to a party to the proceeding cannot be called in aid to while interpreting a procedural provision contained in the Act. Section 148 of the Code provides that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. Various situations can be envisaged where a party to the proceeding is prevented by circumstances beyond his control from doing the required act within the fixed period. The assessee may be able to point out that because of a sudden death in the family or because of his sudden illness of a serious nature or because he had to leave for an outside place all of a sudden or because he could not return from outside in spite of his best efforts, or for other good reasons, as the case may be, he was not able to file the return within time. This Court while dealing with the power of the Court under Section 148 observed as under in the case of *Mahanth Ram Das vs. Ganga Das* AIR 1961 SC 882:

> "The procedural orders though peremptory (conditional decrees apart) are, in essence, in terrorem so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely stop a Court from taking note of events and circumstances which happen within the time fixed."

This Court further observed that Section 148 clothes the Court with ample power to do justice to a litigant if sufficient cause is made out for extension and that an order extending time for payment, though passed after the expiry of the time fixed, could operate from the date on which the time fixed expired.

The learned counsel for the Revenue strongly relied upon the decision of the Andhra Pradesh High Court in *T. Venkata Krishnaiah and Co. vs. CIT* 93 ITR 297 wherein it has been held that it is not open to the assessee to file an application beyond the period within which he was required to file his return as per the notice under Section 139 and submitted that it deserved to be accepted as laying down the correct law on the point. In that case one of the questions which was referred to the High Court for its opinion was whether the Income-tax Officer should be deemed to have granted extension of time for filing the return when he did not pass any orders on the assessee's belated application? The High Court held :

> "There is no provision in the Act or the rules made thereunder which requires the Income-tax Officer to pass an order on an application filed by an assessee subsequent to the time given to him for filing his return pursuant to a notice under sub-section (2) to Section 139. ... We may add that there is no scope for presuming or assuming that an application filed by an assessee for extension of time must have been granted in its application by the Income-tax Officer. There is no scope for such a presumption or deeming provision in a taxing statute. The Income-tax Act is a self-contained code. The provisions of the Act and the Rules made thereunder must specifically provide for such a deeming provision. Otherwise, the assessee cannot claim any advantage or derive benefit when the Income-tax Officer did not pass any order on its application filed beyond the time within which it was required to furnish its return."

The High Court also observed that as the application for extension of time was not received by the Income-tax Officer within time, he was not bound to pass any order thereon. It also observed that it was not open to the assessee to file an application beyond the period within which it was required to file its return as per the notice under Section 139. We do not think that High Court was right in holding that it was not open to the assessee to file an application beyond the period within which he was required to file his return. What appears to have weighed with the High Court while taking that view is the absence of any specific provision in the Act or the rules permitting the assessee to file such an application. For various reasons the Legislature may not make provisions in detail in matters of procedure to be followed. It may rest with conferring discretionary power upon the Court or the authority and leave it to the Court or that authority to exercise that power in its discretion as deemed proper and just depending upon the facts and circumstances of each case. Whether a particular thing could

be done or not in absence of a specific provision to that effect would depend upon the object of that provision and other relevant factors like the consequences which may follow if it is held that it cannot be done. From mere absence of a specific provision authorising the ITO to entertain an application made beyond time it was not proper to hold that it was not open to the assessee to make an application under Section 139(2) for extension of time after the time allowed had expired and that such an application could not be entertained by the ITO. If an application could be made even after the time allowed had expired it became the duty of the ITO either to grant it or reject it. Once the assessee called upon the ITO to exercise his discretion it was not open to him to ignore that request and not to pass any order thereon. In our opinion, the Andhra Pradesh High Court did not correctly interpret the proviso to Section 139(2).

The Patna High Court in *CIT vs. S.P. Viz Construction Co.* 165 ITR 732 has also, in the context of Section 139, held that "any application filed after the due date for filing the return loses all its sanctity." If the assessee made an application for extension of time after the expiry of the time allowed then the Income-tax Officer was not bound under the provisions of the Income Tax Act or the rules made thereunder to pass any order thereon. The Patna High Court has only followed the decision of the Andhra Pradesh High Court in the case of *T. Venkata Krishnaiah and Co.* (supra). In *Assam Frontier Veneer and Saw Mills vs. CIT* 104 ITR 479, to which our attention was drawn by the learned counsel for the Revenue, the Gauhati High Court held that "the Income-tax Officer is not obliged to take into consideration an application for extension of time filed by an assessee in accordance with Form No.6, rule 13 of the Income-tax Rules, 1962, even when it is admittedly submitted long after the due date for filing the return, unless there be *prima facie* valid grounds taken therein, explaining the reasons for the delay." The Gauhati High Court referred to the decision of the Andhra Pradesh High Court in *T. Venkata Krishnaiah and Co.* (supra) and observed that it was in agreement generally with the observation made therein while answering the question whether the Income-tax Officer should be deemed to have granted extension of time for filing the return when he did not pass any orders on the assessee's belated application and particularly with the one stating "that it is the duty of an assessee to file his application or extension of time before the expiry of the due date of his return." Having said so the Gauhati High Court observed that "On the other hand, we also did not see that Income-tax Officer would cease to have any power, under this proviso to exercise his discretion to grant extension of time upon a belated application, provided it is filed before the assessment order." From a close reading of that decision it becomes clear that it does not support the contention now raised before us by the learned counsel for the Revenue. What it has really held is that the proviso did not oblige the Income-tax Officer to consider an application for extension, however, belatedly it might

have been made and pass an order thereon, even when it had been made long after the due date of submission of the return.

We hold that the view taken by the Punjab and Haryana High Court in these cases and by the Calcutta High Court in *Sunderdas Thackersay & Bros. vs. CIT* 137 ITR 646 is correct and the contrary view taken by the Andhra Pradesh High Court in *T. Venkata Krishnaiah and Co. vs. CIT* 93 ITR 297, Gauhati High Court in *Assam Frontier Veneer and Saw Mills vs. CIT* 104 ITR 479 and the Patna High Court in *CIT vs. S.P. Viz Construction Co.* 165 ITR 732 is not correct. The applications made by the assessees under Section 139(2) for extension of time after the expiry of the time allowed were maintainable and, therefore, valid. We, therefore, dismiss the appeals but pass no order as to costs.

(1995) 126 Taxation 211 (Gau.)

IN THE HIGH COURT OF GAUHATI

(Before Hon'ble Chief Justice (Acting) Mr. M.K. Sharma)

IT Reference No. 4 of 1990

Kamal Kumar Saharia

vs.

Commissioner of Income-tax

For the Appellant	:	**Dr. A.K. Saraf and K.K. Gupta**
For the Respondent	:	**D.K. Talukdar and B.J. Talukdar**
Decided on	:	4.2.1994

ASSESSMENT — ITO adding Rs. 3,43,014 being amount of cash brought in the books — Assessee claiming amount received from Executive Engineer by cheque on 31.3.1982 — Cheque encashed only on 2.4.1982 — According to revenue the assessee brought its own amount in the guise of cheque — Assessee contending that although expenses and payments recorded on 31.3.1982 but cheques cashed only on 2.4.1982 and afterwards for disbursement of expenses — Claim of the assessee disallowed — Held, neither Tribunal nor ITO gone into accounting system adopted by the assessee — Instead of debiting expenses to P&L account and making payment later, assessee issuing cheques though cashed later — Deduction of expenses allowable.

Income-tax Act, 1961 — Section 143.

FACTS

The facts in this case are that the assessing officer added to the income of the assessee a sum of Rs. 3,43,014/- 'being the amount of cash brought into the books of assessee as received from Executive Engineer by cheque on 31.3.1982' within the previous year 1981-82 corresponding to the

A.Y. 1982-83, while the cheque was encashed only on 2.4.1982. He came to the conclusion that since the assessee had to incur expenses (as shown in his books) aggregating Rs. 3,28,554/-, he brought in the amount of Rs. 3,43,014/- in the 'guise of the cheque' and added the amount as income from undisclosed source. The assessee's contention that the payments for the expenses though paid after encashment of the cheque on 2.4.1982 on different dates but recorded on 31.3.1982 as the cheque which was encashed actually on 2.4.1982 was recorded on 31.3.1982, as all the receipts and expenses relate to the accounting year 1981-82. The CIT (A) deleted the addition and the Tribunal reversed the order of the CIT(A).

DECISION

The Hon'ble Court felt that the learned Tribunal was not justified in upholding the order of the ITO on the ground that the assessee had produced fabricated evidence in the form of vouchars inasmuch as the assessee has explained the delay in production of the vouchers. The Hon'ble court has satisfied that no unaccounted money amounting to Rs. 3,45,014/- was introduced in the books of the assessee on 31.3.1982. It may further be stated that neither the Tribunal nor the ITO had gone into the aspect as to what is the system of accounting adopted by the assessee. It appeared to us that the expenses should have been debited to the profit and loss account by creating the credit accounts to the creditors. But instead of showing liabilities for the expenses in the balance sheet the expenses were shown to have been paid on 31.3.1982 though actually paid later. The system adopted by the assessee does not prove and establish any lack of *bona fides*. It is settled law that the tax authorities have relied on one part of a transaction cannot reject the other part of the same transaction. In the instant case, the expenditure shown to have been incurred by the assessee having been accepted by the income-tax authorities, there was no justification on the facts and circumstances of the case not to accept the receipt as disclosed by the assessee. The Hon'ble Court, therefore, answered the question in the affirmative i.e. in favour of the assessee.

Full text of the Judgment is given below :

JUDGMENT

In this reference at the instance of the assessee, the following question has been referred by the Tribunal under section 256(1) of the Income-tax Act for the opinion of this Court for the assessment year 1982-83 :

> "Has not the learned Appellate Tribunal committed an error on solely basing its judgment on book adjustment entries made on 31.3.1982 after the close of the previous year to find out the financial position of that year, when the payments were actually and really made on or after 2.4.1982 on the encashment of the cheque as found by the lower appellate authority and thereby confirming the addition of Rs. 3,43,014

without any corroborative evidence in the hands of the department that the payments were made on or before 31.3.1982."

The facts in this case are that the Assessing Officer added to the income of the assessee a sum of Rs. 3,43,014/- 'being the amount of cash brought into the books of assessee as received from executive engineer by cheque on 31.3.1982' within the previous year 1981-82 corresponding to the A.Y. 1982-83, while the cheque was encashed only on 2.4.1982. He came to the conclusion that since the assessee had to incur expenses (as shown in his books) aggregating Rs. 3,28,554/-, he brought in the amount of Rs. 3,43,014 in the "guise of the cheque " sand added the amount as income from undisclosed source.

The assessee's contention that the payments for the expenses though paid after encashment of the cheque on 2.4.1982 on different dates but recorded on 31.3.1982 as the cheque which was encashed actually on 2.4.1982 was recorded on 31.3.1982, as all the receipts and expenses relate to the accounting year 1981-82, though received or paid after the accounting year as per its method of accounting regularly employed, was not accepted. The assessee being aggrieved went before the Commissioner (Appeals) who held that the addition of Rs. 3,43,014 was not justified and, therefore, deleted the same.

In coming to the above decision the Commissioner (Appeals) relied on the vouchers produced for some of the expenses and also method of accounting regularly employed by the assessee and the totality of the aforesaid circumstances was considered acceptable by him. He also reproduced in his appellate order the order of assessment to show that the assessee in his cash book has not shown any cash received on 31.3.1982. It was recorded that 'a cheque was received for Rs. 3,16,000 on 31.3.1982'. He has also referred to the evidence produced on behalf of the assessee to show that expenses actually incurred on 8.12.1981 and 6.2.1982 were recorded on 31.3.1982.

The revenue filed appeal against the order of the Commissioner (Appeals) before the Tribunal who reversed the order of Commissioner (Appeals) and restored the order of the Assessing Officer in respect of the addition of Rs. 3,43,014 as income from undisclosed sources. In coming to the finding, the Tribunal relied upon the book entries of the assessee as only acceptable evidence and held that no other subsidiary evidence such as voucher, etc., could be relied upon. The Tribunal had not gone into the question of the method of accounting regularly employed by the assessee.

We are of the opinion that the question referred to us as such is not a question of law but following questions of law do arise out of the order of the Tribunal:

"(i) Whether the learned Tribunal had not erred in law in considering the subsidiary evidence such as payment vouchers and also in not

considering the method of accounting regularly employed by the assessee?

(ii) Whether the learned Tribunal had not erred in law in sustaining the addition of Rs. 3,43,014 as income from undisclosed source only on the basis of part of the accounts?"

We have heard Dr. A.K. Saraf, the learned counsel for the assessee and also Mr. D.K. Talukdar, the learned standing counsel representing the revenue on the aforesaid questions of law reframed by us. Dr. Saraf submits that the system of the accounting which the assessee was following was the mercantile system of accounting. He further submits that there was no introduction of unaccounted money on 31.3.1982 and that the expenditure incurred has been shown as incurred on 31.3.1982 although in fact, actual payments were made after the cheque was actually encashed and that all such expenditure are supported by vouchers. According to the learned counsel, the ITO having accepted the expenses incurred as correct was not justified in coming to the conclusion that the expenses were made from some undisclosed sources. On the other hand, Mr. Talukdar submits that cash book and other books maintained by the assessee are primary evidence, that payments have already been incurred by the assessee in respect of those specified items for specified amounts and that no other evidence was necessary and, accordingly, the ITO was justified in making the addition of the amount. According to him, on the facts and circumstances of the case, the learned Tribunal was justified in reversing the findings of the Commissioner (Appeals) and restoring the order of the ITO.

We have considered the rival submissions made by the learned counsels for the parties. We have also been taken through the three orders relevant to the case on hand, Having perused the same and on hearing the counsels we feel that the learned Tribunal was not justified in upholding the order of the ITO on the ground that the assessee had produced fabricated evidence in the form of vouchers inasmuch as the assessee has explained the delay in production of the vouchers, which appear from the records of the case. Under such circumstances the finding of the ITO that the assessee had produced fabricated evidence in the form of vouchers cannot be upheld. In that view of the matter we are satisfied that no unaccounted money amounting to Rs. 3,45,014/- was introduced in the books of the assessee on 31.3.1982. It may further be stated that neither the Tribunal nor the ITO had gone into the aspect as to what is the system of accounting adopted by the assessee. It appeared to us that the expenses should have been debited to the profit and loss account by creating the credit accounts to the creditors. But instead of showing liabilities for the expenses in the balance sheet the expenses were shown to have been paid on 31.3.1982 though actually paid later. The system adopted by the assessee may not be proper but the same, in any manner, does not prove and establish any lack of *bona fides*

on the part of the assessee. It appears to us that the finding arrived at by the ITO which has been upheld by the learned Tribunal to the effect that the vouchers produced by the assessee were not correct and were fabricated evidence is based on conjectures, surmises and suspicion and no relevant material could be pointed out by the said authorities for arriving at such a finding. We are, therefore, of the opinion that it would be too remote and far-fetched, on the facts and in the circumstances of the case, to hold that the vouchers produced by the assessee were not correct and that they were fabricated evidence and, accordingly, we hold that there is no direct nexus between the facts found and conclusion therefrom.

It is settled law that the tax authorities have relied on one part of a transaction cannot reject the other part of the same transaction. In the instant case, the expenditure shown to have been incurred by the assessee having been accepted by the income-tax authorities, there was no justification on the facts and circumstances of the case not to accept the receipt as disclosed by the assessee.

In view of the aforesaid findings we answer the questions of law reframed by us in the affirmative, i.e., in favour of the assessee and against the revenue. We, however, make no order as to cost.

(1995) 126 Taxation 215 (J&K)

IN THE HIGH COURT OF JAMMU & KASHMIR

(Before the Hon'ble Justice Mr. R.P. Sethi)

WP No. 803 of 1984

Yash Paul

vs.

Income-tax Officer

For the Appellant	:	**H.L. Bhagotra**
For the Respondent	:	**T.S. Thakur**
Decided on	:	3-9-1992

LIABILITY OF DIRECTORS TO PAY TAX — A.Ys. 1965-66 to 1968-69 — Section 179 amended in 1975 — Held, section 179 prior to amendment applicable only where company went in liquidation — Recovery of taxes from director relating to pre-amendment period when company not gone in liquidation not recoverable.

Income-tax Act, 1961 — Sections 179 & 226 (3).

FACTS

The petitioners who are the directors of M/s Rashtriya Loan and Chit Fund Pvt. Ltd., Purani Mandi, Jammu, have challenged the assessment orders made for the years 1965-66, 1966-67, 1967-68 and 1968-69 and

also for quashing of the notice issued to them dt. 28-2-1984 and served upon them on 20-9-1984 u/s 179 of the IT Act, 1961. They have also prayed for quashing of the notice issued u/s 226(3) of the IT Act directing the Manager, Vijaya Bank, Old Hospital Road, Jammu, calling upon him to remit the amount in deposit lying with the bank in Account No. 110 to clear the arrears of the income-tax. It is submitted that as in view of the judgment in Syed Mubarak Shah Naqshabandi vs. CIT (1977) 110 ITR 217 (J&K), the company is not liable to pay the tax, no notice of demand could be issued to the directors of the company. It is further submitted that prior to the Taxation Laws (Amendment) Act, 1975, Section 179 of the IT Act operated only in case of private company in liquidation and that the directors of the company were not personally liable prior to the amendment.

DECISION

The Hon'ble court held that it is admitted position on facts that the company M/s Rashtriya Loan and Chit Fund Pvt. Ltd. has not gone into liquidation so far. The Supreme Court in *S. Hardeep Singh & Anr. vs. ITO* (1979) 118 ITR 57 (SC), held that Section 179 was amended in 1979 making it more stringent against the director of a company and that prior to it the provision applied only in a case where the company had gone into liquidation. Their Lordships held that there were stages when a company goes into liquidation, namely, (1) the commencement of the winding up of the company, (2) continuation of the proceedings or the step of winding up, and (3) the final winding up and dissolution of the company. It is settled proposition of law that the tax legislations are not retrospective in operation unless specifically declared as such by the legislature. The amendment made in section 179 of the Act was not retrospective and not applicable to the assessment orders made prior to that date. Prior to the amendment of Section 179 in 1975 by the TLA Act, 1975, a director of a private limited company was liable jointly and severally for the payment of his company's tax arrears only if the company had been wound up. After the amendment of Section 179 in 1975, where any tax was due from a private company which could not be recovered from the company, every person who was a director of the company is jointly and severally liable for the payment of such tax unless he proves that the non-recovery could not be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. There is nothing in Section 179, after its amendment in 1975, which makes its operation retrospective. Therefore, where the tax sought to be collected from a director of a private limited company in respect of the tax arrears of the company, related to the years prior to the coming into force of the amended Section 179, the director cannot be saddled with the liability to pay the tax arrears of the company. Under the circumstances, the petitions were disposed of by upholding the assessment orders for the A.Ys. 1965-66 to 1968-69 so far as M/s Rashtriya

Loan & Chit Fund Pvt. Ltd. is concerned but notices issued to the petitioners u/s 179 of the IT Act were quashed. It was held that the petitioners who were the directors of M/s Rashtriya Loan & Chit Fund Pvt. Ltd. are not personally liable to pay the tax in terms of the amended Section 179 of the IT Act.

Cases referred to :

1. *Syed Mubarak Shah Naqshabandi vs. CIT* (1977) Taxation 47(3)-17 (J&K); (1977) 110 ITR 217 (J&K)
2. *S. Hardeep Singh & Anr. vs. ITO* (1979) 118 ITR 57 (SC)
3. *N. Bella Gouder vs. Tehsildar, Connoor* (1969) 71 ITR 26 (Mad.)
4. *Parveen Desai vs. ITO* (1984) 149 ITR 187 (Bom.)
5. *M.D. Lotikar vs. R.C. De Souza, CIT* (1984) 145 ITR 433 (Bom.)

Full text of the Judgment is given below :

JUDGMENT

(R.P. Sethi, J.)

The petitioners who are the directors of M/s Rashtriya Loan & Chit Fund Pvt. Ltd., Purani Mandi, Jammu, have challenged the assessment orders made for the years 1965-66, 1966-67, 1967-68 and 1968-69 and also for quashing of the notice issued to them under s. 179 of the IT Act, 1961, dt. 28th Feb., 1984, served upon them on 20th Sep., 1984. They have also prayed for quashing of the notice issued under s. 226(3) of the IT Act directing the Manager, Vijaya Bank, Old Hospital Road, Jammu, calling upon him to remit the amount in deposit lying with the bank in Account No. 110 to clear the arrears of the income-tax. It is submitted that as in view of the judgment in *Syed Mubarak Shah Naqshabandi vs. CIT* (1977) 110 ITR 217 (J&K), (1977) JKIR 1, the company is not liable to pay tax, no notice of demand could be issued to the directors of the company. It is further submitted that prior to the Taxation Laws (Amendment) Act, 1975, s. 179 of the IT Act operated only in case of private company in liquidation and that the directors of the company were not personally liable prior to the amendment.

In the counter-affidavit filed on behalf of the respondent it is submitted that the petition was liable to be dismissed on account of the unexplained delay and laches and that the company, namly, M/s Rashtriya Loan & Chit Fund Co., was rightly assessed to the income-tax. It is contended that the petitioners are personally liable to pay the tax under s. 179 of the Act being directors of the company.

I have heard learned counsel for the parties and perused the record.

The principles regarding the plea of delay and laches have been dealt with in detail while passing judgment in WP No. 809/84 of the date. However,

in the instant case, the demand was made from the petitioners on 20th Sept., 1984 and they filed the present petition on 27th Oct., 1984 without wasting any time. The petitioners in these petitions have been proved to be vigilant and their petition cannot be dismissed on the alleged ground of delay and laches.

So far as the liability of M/s Rashtriya Loan & Chit Fund Co. is concerned, the argument of the petitioners has no force in view of the judgment delivered in writ petition No. 809 of 1984.

Prior to its amendment made in 1975, s. 179 of the Act, provided :

> 179. *Liability of directors of private company in liquidation* — Notwithstanding anything contained in the Companies Act, 1956, when any private company is wound up after the commencement of this Act, and any tax assessed on the company, whether before or in the course of or after its liquidation, in respect of any income of any previous year cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company."

It is admitted position on facts that the company M/s Rashtriya Loan & Chit Fund Pvt. Ltd. has not gone into liquidation so far. The Supreme Court in *S. Hardeep Singh & Anr. vs. ITO* (1979) 118 ITR 57 (SC), held that s. 179 was amended in 1979 making it more stringent against the director of a company and that prior to it the provision applied only in a case where the company had gone into liquidation. Their Lordships held that there were three stages when a company goes into liquidation, namely, (1) the commencement of the winding up of the company; (2) continuation of the proceedings or the step of winding up; and (3) the final winding up and dissolution of the company.

The provisions of s. 179, before amendment, were held not to be applicable if all these three stages were complete before the Act came into force on 1st April, 1962. If all the three stages happened after the commencement of the 1962 Act, s. 179 was held to be attracted. The Madras High Court also in *N. Bella Gouder vs. Tehsildar, Connoor* (1969) 71 ITR 26 (Mad.) came to the conclusion that the provisions of s. 179 will not apply unless the company had gone in liquidation or was under the process of liqidation. The amendment of s. 179 made in 1975 was intended to provide a stringent measure of fiscal legislation which resulted in cutting on the root the doctrine of limitated liability of the companies. After the amendment, a director of the company was made liable for the company's debt, notwithstanding that the company had gone into liquidation or not and without ascertaining as to whether such director was guilty of misfeasance or other wrong. Prior to the amendment the director was presumed to be innocent till he was proved to be a wrong doer.

It is settled proposition of law that the tax legislations are not retrospective in operation unless specifically declared as such by the legislature. It was held by the Bombay High Court in *Parveen Desai vs. ITO* (1984) 149 ITR 187 (Bom.), that the amendment made in s. 179 of the Act was not retrospective and not applicable to the assessment orders made prior to that date. In that case, the assessment made for the years 1961-62 to 1968-69, was held not to be governed by the amendment. Similarly in another case the Bombay High Court in *M.D. Lotlikar vs. R.C. DeSouza, CIT* (1983) 145 ITR 433 (Bom.), held that the provisions of s. 179 after its amendment are prospective in operation. It was further held by the said Court that the directors could not be held liable for tax due from the company relating to the years prior to the coming into force of the amended s. 179. It was held in that case :

> "Prior to the amendment of s. 179 in 1975 by the TLA Act, 1975, a director of a private limited company was liable jointly and severally for the payment of his company's tax arrears only if the company had been wound up. After the amendment of s. 179 in 1975, where any tax due from a private company which could not be recovered from the company, every person who was a director of the company is jointly and severally liable for the payment of such tax unless he proves that the non-recovery could not be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. There is nothing in s. 179, after its amendment in 1975, which makes its operation retrospective. Therefore, where the tax sought to be collected from a director of a private limited company in respect of the tax arrears of the company, related to the years prior to the coming into force of the amended s. 179, the director cannot be saddled with the liability to pay the tax arrears of the company."

The respondent has nowhere alleged that the petitioners were guilty of any negligence in the discharge of their duties as directors. As the liability of payment of tax was imposed upon the petitioners on the presumed application of the amended s. 179 of the IT Act, the orders impugned in the instant cases are, therefore, without jurisdiction.

Under the circumstances, the petitions are disposed of by upholding the assessment order for the years 1965-66, 1966-67, 1967-68, 1968-69, so far as M/s Rashtriya Loan & Chit Fund Pvt. Ltd. is concerned but notices issued to the petitioners under s. 179 of the IT Act are quashed. It is held that the petitioners who were the directors of M/s Rashtriya Loan & Chit Fund Pvt. Ltd. are not personally liable to pay the tax in terms of the amended s. 179 of the IT Act.

(1995) 126 Taxation 220 (Ker.)

IN THE HIGH COURT OF KERALA

(Before Hon'ble Justice Mr. K.S. Paripooman & Hon'ble Justice Mr. K.P. Balanarayana Marar)

IT Reference No. 36 of 1988

Commissioner of Income-tax

vs.

K.S. Mohammed

For the Appellant	:	**P.K.R. Menon & N.R.K. Nair**
For the Respondent	:	**P.C. Chacko & Roy Chacko**
Decided on	:	17-11-1993

REVISION OF ORDER BY CIT — CIT cancelling order of the ITO and directing that sales-tax liability allowed as a deduction be withdrawn — Direction issued to tax the amount — Assessee filing appeal — Tribunal holding principle of merger applicable and CIT not empowered to cancel assessment — Also holding that the liability became extinct by a Notification dated 3-4-1979 and could only be taxed in A.Y. 1980-81 — Held, since the point of sales-tax not before CIT(A) no merger of the order of CIT(A), CIT(A) empowered to resort to cancellation u/s 263 — Since Notification issued on 3-4-1979, the amount could only be taxed in A.Y. 1980-81 and not 1979-80 as directed by CIT.

Income-tax Act, 1961 — Sections 37(1) and 263.

FACTS

The respondent is an assessee to income-tax. He is an exporter of sea food. The A.Y. involved is 1979-80 for which the accounting period ended on 31-3-1979. In respect of the purchase of marine products, the assessee had made a provision for purchase tax in a sum of Rs. 3,45,864/-. The ITO allowed this provision without much discussion. The CIT, in suo motu revisional proceedings, held that no part of the liability for purchase tax arose during the accounting year and the deduction of Rs. 3,45,864/- was an error. He directed revision of the order of the assessment. The matter was taken up in appeal before the Tribunal by the assessee. By order dated 8-12-1986, the Tribunal followed its earlier order in ITA No. 795 (Coch)/1984 dated 4-12-1986 in the case of S. Ratnam Pillay, wherein the Tribunal had held that the earliest point of time for bringing the amount to tax was only 3rd April, 1979, which fell within the accounting year 1979-80 relevant to the A.Y. 1980-81. In this view of the matter, the Tribunal held that the CIT was not justified in directing the ITO to tax the amount in the A.Y. 1979-80 solely based on the date of the notification. It also held that since the order of the ITO merged with that of CIT(A), even otherwise the CIT could not revise the order of the ITO.

DECISION

The Hon'ble Court held that the doctrine of merger was inapplicable in the instant case since the issue of allowability of sales-tax/purchase tax was not a subject matter of appeal before CIT(A). The Hon'ble Court further held that since the notification although issued on 29-3-1979 was applicable only from 3-4-1979, the directions of the CIT to ITO to tax the amount in A.Y. 1979-80 based solely on the date of notification, was not correct. The issue was, therefore, decided in favour of the assessee.

Case referred to :

CIT vs. S. Ratnam Pillay (1991) 101 Taxation 257 (Ker.); (1991) 188 ITR 494 (Ker.)

Full text of the Judgment is given below :

JUDGMENT

(K.S. Paripoornan, J.)

At the instance of the Revenue, the Tribunal, Cochin Bench, has referred the following two questions of law for the decision of this Court :

"(a) Whether, on the facts and in the circumstances of the case, the CIT had jurisdiction under s. 263 when the CIT(A) had already passed order in respect of certain other matters in the same assessment?

(b) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the notification dt. 29th March 1979, was effective only from 3rd April, 1979 and, therefore, the liability towards the purchase-tax had ceased in the asst. year 1980-81?"

The respondent is an assessee to income-tax. He is an exporter of sea food. We are concerned with the asst. year 1979-80, for which the accounting period ended on 31 March, 1979. In respect of the purchase of marine products, the assessee had made a provision for purchase tax in a sum of Rs. 3,45,864. The ITO allowed this provision without much discussion. The CIT, in *suo motu* revisional proceedings, held that no part of the liability for purchase tax arose during the accounting year and the deduction of Rs. 3,45,864 was an error. He directed revision of the order of the assessment. The matter was taken up in appeal before the Tribunal by the asseseee. By order dt. 8th Dec., 1986, the Tribunal followed its earlier order in ITA No. 795 (Coch)/1984 dt. 4th Dec. 1986 in the case of *S. Ratnam Pillay*, wherein the Tribunal had held that the earliest point of time for bringing the amount to tax was only 3rd April, 1979, which fell within the accounting year 1979-80 relevant to the asst. yr. 1980-81. In this view of the matter, the Tribunal held that the CIT was not justified in directing the ITO to tax the amount in the asst. yr. 1979-80 solely based on the date of the notification. It is thereafter, at the instance of the Revenue

the questions of law formulated hereinabove have been referred for the decision of this Court.

We heard counsel for the Revenue, Senior Advocate Mr. P.K.R. Menon, as also counsel for the respondent-assessee.

At the outset, we should state that question No. 2, as formulated by the Tribunal, is a patent error, which has not conveyed the real question that arose for adjudication before the Tribunal and still remains in controversy between the parties. The question formulated has not also reflected question No. 2, which was submitted by the Revenue before the Tribunal. The sole question that arose before the Tribunal was, whether the notification dt. 3rd April, 1979 was available to be taken advantage of, for the accounting period ended on 31st march, 1979. It was not so available in view of the earlier decision in *Ratnam Pillay's* case (ITA No. 795 (Coch)/1984) dt. 4th Dec., 1986. The question is not whether it has ceased to be a liability for the year 1980-81. That was not germane to the issue. So, we reframe question No. 2 in the following manner :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the notification dt. 29th March, 1979 was effective only from 3rd April, 1979 and, therefore, the liability towards the purchase tax was not of the asst. yr. 1979-80 (year ending 31st march, 1979)?"

We shall proceed to consider the merits of the controversy in the light of the question as reframed by us.

It is common ground that the earlier decision of the Tribunal, i.e., *Ratnam Pillay's* case, wherein the two questions formulated herein (as reframed) came up for consideration before this Court. The decision of this Court is reported in *CIT vs. S. Ratnam Pillay* (1991) 188 ITR 494 (Ker.). After an exhaustive review of the relevant decisions, this Court held that the doctrine of merger is inapplicable in the instant case and the Tribunal was in error in invoking the theory of merger and in holding that the order of the CIT under s. 263 of the IT Act is without jurisdiction. It was so held, since the point considered by the CIT was not the subject-matter of appeal before the first appellate authority. In the decision reported in (1991) 188 ITR 494 (Ker.) (supra), we have answered the said question in the negative, against the assessee and in favour of the Revenue. Following the said Bench decision, we answer question No.1 in this case in the affirmative, in favour of the Revenue and against the assessee.

The second question turns upon the legal effect of the notification dt. 3rd April, 1979. It was held in the aforesaid Bench decision of this Court that the notification dt. 29th March, 1979 was published and made available to the public only on 3rd April, 1979 and can be effective only from that date onwards. Following the above Bench decision, we hold that the notification dt. 29th March, 1979 can be effective only from 3rd April,

1979. In this perspective, the liability towards the purchase tax did not fall during the accounting period ended on 31st March, 1979, relevant for the asst. yr. 1979-80. We hold so. We answer question No. 2 in the affirmative, against the Revenue and in favour of the assessee.

The reference is disposed of, as above.

(1995) 126 Taxation 223 (Orissa)

IN THE HIGH COURT OF ORISSA

(Before Hon'ble Justice Mr. S.C. Mohapatra & Hon'ble Justice Smt. A.K. Padhi)

Misc. Judicial Case No. 24 of 1991

Mathura Prasad Ram

vs.

Commissioner of Income-tax

For the Appellant	:	**None**
For the Respondent	:	**A.K. Roy**
Decided on	:	6-8-1992

REFERENCE — Reference application dismissed on merits ex-parte — Assessee praying for restoration of application — Held, no provision in the Act for restoration of the reference application — Decided on merits.

Income-tax Act, 1961 — Section 256(2).

FACTS & DECISION

The assessee filed a reference application before the Tribunal. On the date fixed nobody appeared and the application was dismissed on merits. Subsequently, the assessee applied for restoration which was refused and in this context the assessee approached the High Court. The ground of the assessee was that since his counsel who was entrusted with the reference application was sick, he did not know about the case having been fixed for hearing. The Hon'ble court held that there was no provision in the Act for restoration of an application u/s 256(2) of the Act. The Hon'ble court further held that the Civil Procedure Code is not applicable to attract inherent powers in exercise of the advisory jurisdiction of the court for restoration of such applications. The matter was decided against the assessee.

Full text of the Judgment is given below :

JUDGMENT

When this matter was called, the petitioner was not available to be heard. Learned standing counsel for the IT Department was, however, heard in the matter.

The petitioner has filed an application stating that he had engaged

M/s B.K. Mohanty, P.K. Mishra, S.P. Choudhury, etc. in SJC No. 34 of 1980. Since he suffered from serious bronchitis and other ailments, he was immobile and confined to bed from 6th Aug., 1990 to 4th Oct., 1990. Therefore, he could not have any contact with the advocates engaged by him nor could he prosecute the reference under s. 256(1) of the IT Act, 1961. After recovery, he came to know that the reference was listed for hearing and on account of his absence and the absence of counsel engaged, this Court had passed an order dt. 9th Aug., 1990, refusing to answer the questions of law arising in that case. Therefore, he prays for restoration of the application under s. 256(2) of the IT Act as the tax liability is more than Rs. 50,000 and he is aged 72 years.

Mr. A.K. Roy, learned standing counsel (income-tax), submitted that there is no scope for restoring a reference application which was decided on merits even though the same was in the absence of the party or his counsel. Mr. Roy is correct in his submission. There is no provision under the IT Act for restoration of an application under s. 256(2) of the Act. The Civil Procedure Code is not applicable to attract inherent powers in exercise of the advisory jurisdiction of the Court for restoration of such application. Therefore, where the Court has considered the application on merits and refused to answer the reference, the scope for restoring such application because it was heard *ex parte*, is not available. In this view of the matter, there is no merit in this application which is accordingly dismissed.

TAX REPORTS

(1995) 126 Taxation 225 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

(Before Hon'ble Mr. Justice M. Ranga Reddy)

Criminal Appeals Nos. 779 & 780 of 1992

Income-tax Officer

vs.

Ashoka Biscuit Works & Ors.

For the Appellant	:	**P. Suresh Tekmal**
For the Respondent	:	**D. Man Mohan**
Decided on	:	27.6.1994

PROSECUTION — Assessee showing sales of goods sent on commission after confirmation of sale received from agents — For A.Ys. 1987-88 and 1988-89 although confirmation received in the month of March but sales shown in subsequent year — During the course of assessment assessee realising mistake and filing revised return — Assessment completed and penalty proceedings initiated — Prosecution proceedings also filed — Penalty deleted by Tribunal — Held, no wilful attempt on the part of the assessee to conceal income — The ingredients of offence u/s 276C of the Act not fulfilled — Prosecution petition rightly dismissed.

Income-tax Act, 1961 — Sections 276C & 277.

FACTS

The firm was carrying on business in manufacture and sale of biscuits. The biscuits are supplied on the sale and return basis to the commission agents. The value of stocks supplied cannot be treated as sold out, unless the commission agents informed the sale and sent the statements. The entries in the accounts were made only after the sales statements are received from the commission agents. The firm filed its return of income on 14.10.1977 and 21.11.1978 declaring the total taxable income at Rs. 2,14,014 and Rs. 3,43,027/- for the A.Ys. 1977-78 and 1978-79 respectively. While working the taxable income, the firm omitted to take into account the sales made through the commission agents during the last quarter of the year 1977 and 1978 in the A.Ys. 1977-78 and 1978-79 respectively. Thus, an amount of Rs. 7,79,796/- being the amount of sales during February and March, 1977 which ought to have been included in the returns for the A.Y. 1976-77 are not included in that year but are included in the returns for the A.Y. 1977-78. Similarly, sales to a tune of Rs. 7,17,059/- effected in March, 1978, which ought to have been shown in the returns for 1977-78 are shown in 1978-79.

Thus, by following this mistaken system of recording the commission sales on the day of receipt of the sales statement, the consignment sales pertaining to the year 1977-78 were accounted for in the year 1978-79 and the consignment sales pertaining to the year 1978-79 were recorded in the books of accounts for the year 1979-80.

DECISION

The Hon'ble Court held that as this mistake in accounting the consignment was realised, the firm immediately filed revised returns on 15.6.1979. The assessment for both the years was completed accordingly and simultaneously the penalty proceedings were initiated. The Tribunal deleted the penalties by holding that the revised returns were filed before any detection by the Department and further held that the ITO has not brought home concealment of income. There was only postponement of payment of tax and there was no loss of revenue. The main ingredient of the offence u/s 276 of the IT Act is wilful attempt to conceal the income. The Tribunal which is the highest fact finding body came to the conclusion that there was no wilful attempt to conceal the income. The alleged wilful concealment is only on account of mistaken system of method of accounting followed by the accountant of the firm and so it cannot be said that there was any deliberate or intentional attempt on the part of the firm to suppress or conceal the income. Under these circumstances the trial court found that no offence u/s 276C and 277 of IT Act are made out. The appeals preferred by the Department are liable to be dismissed.

Case referred to :

Uttam Chand & Others vs. ITO (1982) 133 ITR 909 (SC)

Full text of the Judgment is given below :

JUDGMENT

(M. Ranga Reddy, J.)

These two appeals in Crl. Appeal Nos. 779/92 and 780/92 are filed by the ITO, E-Ward, Circle-II, Hyderabad, against the judgment in C.C. No. 128/86 and C.C. No. 127/86 on the file of Special Judge for Economic Offences, Hyderabad respectively acquitting the respondents accused of offences under ss. 276C and 277 of the IT Act and ss. 193 and 196, IPC by separate judgments dt. 31st Oct., 1991. As the dispute in respect of these two appeals is identical they are being disposed of by this common judgment.

The facts of the case as emerging from the evidence of witnesses adduced during trial can briefly be stated as follows: The R-1 firm was carrying on business in manufacture and sale of biscuits. The biscuits are supplied on the sale and return basis to the commission agents. The value of stocks supplied cannot be treated as sold out, unless the commission agents informed the sale and sent the statements. The entries in the accounts were

made only after the sales statements are received from the commission agents. The R-1 firm filed its return of income on 14.10.1977 and 21.11.1978 declaring the total taxable income at Rs. 2,14,014 and Rs. 3,43,027 for the A.Ys. 1977-78 and 1978-79 respectively.

While working out the taxable income, the firm omitted to take into account the sales made through the commission agents during the last quarter of the year 1977 and 1978 in the A.Ys. 1977-78 and 1978-79 respectively. Thus, an amount of Rs. 7,79,796 being the amount of sales during February and March, 1977 which ought to have been included in the returns for the A.Ys 1976-77 are not included in that year but are included in the returns for the A.Y. 1977-78. Similarly, sales to a tune of Rs. 7,17,059 effected in March, 1978, which ought to have been shown in the returns for 1977-78 are shown in 1978-79. Thus, by following this mistaken system of recording the commission sales on the day of receipt of the sales statement, the consignment sales pertaining to the year 1977-78 were accounted for in the year 1978-79 and the consignment sales pertaining to the year 1978-79 were recorded in the books of accounts for the year 1979-80.

It so happened during the course of examination of accounts of R-1 firm, the ITO had an occasion to go through the ledger relating to the asst. yr. 1977-78 wherein the sales through the commission agents relating to the year ending 31st March, 1977, were found accounted during the asst. yr. 1977-78. As this mistake in accounting the consignment was realised, the first accused firm immediately filed revised returns on 15th June, 1979, disclosing a total income of Rs. 4,06,569 for the asst. yr. 1977-78 and for 1978-79 by 21st July, 1979 by duly adjusting the taxable income. The assessment for both the years was completed accordingly and simultaneously the penalty proceedings were initiated for both the years. The Tribunal deleted the penalties by holding that the revised returns were filed before any detection by the Department and further held that the ITO has not brought home concealment of income by R-1 firm and the orders of the Tribunal have become final as no reference was filed before the High Court against the findings of the Department. So, in both the cases it was found that there was no wilful attempt to conceal the income.

Even the evidence of PW 1 is to the effect that there was only postponement of payment of tax and there was no loss of revenue. The main ingredient of the offence u/s 276 of the IT Act is wilful attempt to conceal the income. In *Uttam Chand & Ors vs. ITO* (1982) 133 ITR 909 (SC) it was observed that the prosecution once initiated may be quashed in the light of the finding favourable to the assessee recorded by an authority under the Act subsequently in respect of the relevant assessment proceedings. There is no legal bar in giving due regard to the result of the proceedings under the IT Act. In the instant case the alleged wilful concealment is only on account of

mistaken system of method of accounting followed by the accountant of the firm and so it cannot be said that there was any deliberate or intentional attempt on the part of the firm to suppress or conceal the income. Under these circumstances the trial Court found that no offence u/ss 276C and 277 of IT Act are made out.

The learned counsel for the respondents took me through the entire judgment and I find that the trial Court has given cogent and convincing reasons for acquitting the accused. I do not think that the circumstances of the case warrant any interference with the order of acquittal recorded by the trial Court. I, therefore, find that the appeals preferred by the Department are liable to be dismissed and are accordingly dismissed.

(1995) 126 Taxation 228 (Bom.)

IN THE HIGH COURT OF BOMBAY

(Before Hon'ble Mrs. Justice Dr. B.P. Saraf &
Hon'ble Mr. Justice D.R. Dhanuka)

IT Reference No. 422 of 1983

Consolidated Pneumatic Tool Co. (India) Ltd.

vs.

Commissioner of Income-tax

For the Appellant	:	**Aashish Panda**
For the Respondent	:	**Dr. V. Balasubramaniam, with J.P. Devadhar**
Decided on	:	15.9.1993

RECTIFICATION OF MISTAKE — Assessee claiming relief u/s 80J — Relief allowed by Tribunal — ITO allowing relief by applying provision of rule 19A of the I.T. Rules, 1962 — Assessee applying for rectification since Rule 19A declared to be ultra vires by Calcutta High Court — Claim of the assessee rejected — Order of ITO confirmed by CIT(A) — Tribunal holding in view of amendment with retrospective effect, Rule 19A applicable — Held, decision of High Court other than jurisdictional High Court not binding — Claim of the assessee rightly rejected.

Income-tax Act, 1961 — Sections 80J & 154

Income-tax Rules, 1962 — Rule 19A.

FACTS

The controversy in this case pertains to A.Y. 1973-74. The assessee company filed its return of income on 14.8.1973. Subsequently, on 29.12.1973, it filed a revised return in which it also claimed a deduction u/s 80J of the I.T. Act, 1961. The assessment was completed on 17.8.1976, and in the same, relief u/s 80J was not allowed by the ITO. The assessee

took up the matter in appeal. The appeal of the revenue against the above order was dismissed by the Tribunal. The ITO gave effect to the order of the AAC by an order dated 30.3.1977. While giving effect to the order, in working out the deduction u/s 80J the ITO applied Rule 19A of the IT Rules and deducted the borrowed capital and some other liabilities for computation of capital of the assessee. He thus gave relief u/s 80J only on the net capital. The relief was confined to a period of 7 months in that year as production had commenced only on 1.6.1972. On 6.11.1978, the assessee filed an application before the ITO u/ss 154 and 155 of the Act for rectification. It was claimed by the assessee that sub-rules (2) and (3) of Rule 19A had been declared ultra vires by the Calcutta High Court in the case of Century Enka Ltd. vs. ITO (1977) 107 ITR 123 (Cal). It was, therefore, contended that in view of the above decision, relief u/s 80J should be computed on the gross capital without making any deduction on account of borrowed capital and liabilities. The claim of the assessee for rectification was, therefore, rejected. The CIT(A) held that the ITO was fully justified in refusing to rectify his order as there was no mistake apparent from record. The Tribunal took note of the amendment of section made by the Finance Act, 1980 with retrospective effect from 1.4.1972 and observed that the provisions of rule 19A were incorporated in section 80J retrospectively and the original order of the ITO which was sought to be rectified by the assessee was in consonance with the amended section 80J of the Act.

DECISION

The Hon'ble High Court held that admittedly, the amendment was made with retrospective effect from 1.4.1972. The Hon'ble Court found the law well settled by the decision of the Supreme Court in *M.K. Venkatachalam, ITO vs. Bombay Dyeing & Mfg. Co. Ltd.* that the effect of the provision that the particular amendment shall be deemed to come into force from a particular date with retrospective effect is that the amendment must be deemed to have been included in the principal Act as from that date for all purposes. The Tribunal was, therefore, fully justified in relying on the subsequent retrospective amendment of Section 80J of the Act for upholding the rejection of the application of the assessee for rectification of the order by the ITO. The decision of the High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside its own territorial jurisdiction. It is well settled that the decision of the High Court will have the force of binding precedent only in the State or territories in which the Court has jurisdiction. By the amount of stretching of the doctrine of *stare decisis* judgments of one High Court can be given the status of a binding precedent so far as other High Courts or Tribunals within their territorial jurisdiction are concerned. Any such attempt will go counter to the very doctrine of *stare decisis* and also the various decisions of the Supreme Court which have interpreted the scope of ambit thereof. In view of the

above decision of this Court, the Hon'ble Court was of the clear opinion that the ITO was justified in holding that the decision of the Calcutta High Court was not a binding precedent for Court, authorities or Tribunals outside its territorial jurisdiction and on that basis the ITO was right in refusing to modify its order in the light of the decision of the Calcutta High Court.

Cases referred to :

1. *Century Enka Ltd. vs. ITO* (1977) 107 ITR 123 (Cal.)
2. *CIT vs. Smt. Godavaridevi Saraf* (1978) 113 ITR 589 (Bom.)
3. *CIT vs. Warner Hindustan Ltd.* (1979) 117 ITR 68 (AP)
4. *T.S. Balram, ITO vs. Volkart Bros. & Ors.* (1971) 72 ITR 50 (SC)

Full text of the Judgment is given below :

JUDGMENT

(Dr. B.P. Saraf, J.)

By this reference under s. 256 (1) of the IT Act, 1961, the Tribunal has referred the following question of law to this Court for opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in relying upon the subsequent retrospective amendment of s. 80J of the IT Act, 1961, for upholding the rejection by the ITO of the application by the assessee for rectification of the order of the ITO ?"

The controversy in this case pertains to A.Y. 1973-74. The assessee company filed its return of income on 14.8.1973. Subsequently, on 29.12.1973, it filed a revised return in which it also claimed a deduction u/s 80J of the IT Act, 1961 ("the Act"). The assessment was completed on 17th Aug., 1976 and in the same, relief under s. 80J was not allowed by the ITO. The assessee took up the matter in appeal. The AAC held that the assessee was entitled to relief under s. 80J and asked the ITO to work out the same. The appeal of the Revenue against the above order was dismissed by the Tribunal. The ITO gave effect to the order of the AAC by an order dt. 30th March, 1977. While giving effect to the order, in working out the deduction under s. 80J the ITO applied r. 19A of the IT Rules and deducted the borrowed capital and some other liabilities for computation of capital of the assessee. He thus gave relief under s. 80J only on the net capital. The relief was confined to a period of 7 months in that year as production had commenced only on 1st June, 1972. As the particular unit had not made any profit for the relevant year, relief under s. 80J was allowed to be carried forward to the next year. The assessee did not file any appeal against this order of the ITO.

On 6th Nov., 1978, the assessee filed an application before the ITO under ss. 154 and 155 of the Act for rectification of the order dt. 30th March, 1977 referred to above. In the application for rectification, it was claimed

by the assessee that sub-rr. (2) and (3) of r. 19A had been declared *ultra vires* by the Calcutta High Court in the case of *Century Enka Ltd. vs. ITO* (1977) 107 ITR 123 (Cal) and the said decision of the Calcutta High Court was binding on the ITO in Bombay in the light of the decision of the Bombay High Court in *CIT vs. Smt. Godavaridevi Saraf* (1978) 113 ITR 589 (Bom.). It was, therefore, contended that in view of the above decision of the Calcutta High Court, which was also binding on the IT authorities in Bombay, relief under s. 80J should be computed on the gross capital without making any deduction on account of borrowed capital and liabilities. The ITO by his letter dt. 27th Nov., 1978 informed the assessee that the decision of High Court in another State was not binding on the executive authorities and the Calcutta view having not been accepted by the Department, there was no mistake apparent on the face of the record. The claim of the assessee for rectification was, therefore, rejected.

The assessee took up the matter in appeal. The CIT(A) pointed out that the Andhra Pradesh High Court in *CIT vs. Warner Hindustan Ltd.* (1979) 117 ITR 68 (AP) had taken a view different from the one taken by the Calcutta High Court and that the issue regarding deductibility of borrowed capital was highly debatable issue. He, therefore, held that in the light of the decision of the Supreme Court in *T.S. Balaram, ITO vs. Volkart Bros. & Ors.* (1971) 82 ITR 50 (SC), the ITO was fully justified in refusing to rectify his order as there was no mistake apparent from the record. Against the above order of the CIT(A), the assessee appealed to the Tribunal. The Tribunal took note of the amendment of section made by the Finance (No. 2) Act, 1980, with retrospective effect from 1st April, 1972 and observed that the provisions of r. 19A were incorporated in s. 80J retrospectively and the original order of the ITO which was sought to be rectified by the assessee was in consonance with the amended s. 80J of the Act. The Tribunal referred to the decision of the Supreme Court in *M.K. Venkatachalam, ITO vs. Bombay Dyeing & Mfg. Co. Ltd.* (1958) 34 ITR 143 (SC) and observed that s. 80J as amended w.e.f. 1st April, 1972 has to be deemed to be in the statute book in that form ever since 1st April, 1972. The Tribunal, therefore held that in the light of amended s. 80J of the Act the order of the ITO rejecting the prayer of the assessee for rectification of its original order of assessment was correct. In that view of the matter the appeal of the assessee was dismissed by the Tribunal. Hence this reference.

We have considered the question referred to us. The controversy has to be looked into from two angles. Firstly, it may be seen in the light of s. 80J as amended. Admittedly, the amendment was made with retrospective effect from 1st April, 1972. The order of assessment pertains to the year 1973-74. The dispute is regarding the effect of the retrospective amendment. The question is whether the subsequent retrospective amendment of s. 80J could be relied upon by the Tribunal for upholding the order of the ITO. We find that the law is well-settled by the decision of the Supreme

Court in *M.K. Venkatachalam, ITO vs. Bombay Dyeing & Mfg. Co. Ltd.* that the effect of the provision that the particular amendment shall be deemed to come into force from a particular date with retrospective effect is that the amendment must be deemed to have been included in the principal Act as from that date for all purposes. That being so, s. 80J as amended must be deemed to be in existence on the date of passing of the order of assessment by the ITO and applicable to the assessment under consideration. The order of the ITO being consistent with s. 80J as amended with retrospective effect, it cannot be said that there is any mistake therein. The Tribunal was, therefore, fully justified in relying on the subsequent retrospective amendment of s. 80J of the Act for upholding the rejection of the application of the assessee for rectification of the order by the ITO.

Another angle from which the controversy has to be looked into is the effect of decision of Calcutta High Court on the IT authorties in Bombay. The case of the assessee was that the decision of the Calcutta High Court was binding on the ITO authorities in Bombay and following the same the ITO was obliged to rectify this order under s. 154 of the Act. This aspect of the matter has been considered by this Court elaborately in its judgment dt. 22nd April, 1993 in IT Ref. No. 500 of 1978 [*CIT vs. Thana Electricity Supply Ltd.*] reported in (1993) 112 CTR (Bom.) 356 wherein it has been held in clear terms (at page 366 of the Report):

> "The decision of the High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside its own territorial jurisdiction. It is well settled that the decision of one High Court will have the force of binding precedent only in the State or territories in which the Court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only a persuasive effect. By the amount of stretching of the doctrine of *stare decisis* judgments of one High Court can be given the status of a binding precedent so far as other High Courts or Tribunals within their territorial jurisdiction are concerned. Any such attempt will go counter to the above decision of *stare decisis* and also the various decision of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Court or on any subordinate Courts or Tribunals within their jurisdiction. That status is reserved only for the decision of the Supreme Court which are binding on all Courts in the country by virtue of Art. 141 of the Constitution."

In view of the above decision of this Court, we are of the clear opinion that the ITO was justified in holding that the decision of the Calcutta High

Court is not a binding precedent for Courts, authorities or Tribunals outside its territorial jurisdiction and on that basis the ITO was right in refusing to modify its order in the light of the decision of the Calcutta High Court.

Having regard to the foregoing discussion, we answer the question referred to us in the affirmative, i.e., in favour of the Revenue and against the assessee.

Under the facts and circumstances of the case, we make no order as to costs.

(1995) 126 Taxation 233 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta & Hon'ble Mr. Justice Nure Alam Chowdhury)

IT Reference No. 152 of 1992

Commissioner of Income-tax

vs.

Auto Distributors Ltd.

For the Appellant	:	**R.K. Murarka**
For the Respondent	:	**R.C. Prasad**
Decided on	:	22.12.1993

BUSINESS EXPENDITURE — Assessee engaged in taking properties on lease and letting them out on rent — Profit earned taxed as business income — In terms of an agreement between assessee and another party part of the premises sublet — Subletee handing over possession to another party in consideration of loan of Rs. 10,00,000 — Subletee revoking tenancy of third party — Assessee obtaining vacant possession from third party by making certain payments — One vacancy property let out at a much higher rent to bank — Assessee claiming payment made to the subletee as business expenditure — Claim of the assessee disallowed by revenue — Assessee's cl im accepted by Tribunal — Held, no privity of contract between assessee and the third party — Continuance of lease with third party detriment to the business of assessee — No new asset or addition of enduring nature obtained by assessee by making payment — Payment allowable as revenue expenditure.

Income-tax Act, 1961 — Section 37.

FACTS

This reference relates to the income-tax assessment of the assessee company for the A.Y. 1983-84. The assessee company is engaged, inter alia, in the business of taking properties on lease and letting these out

for the purpose of earning income by way of rent. In the course of its aforesaid business, the assessee company took on lease premises at 18A, B and C, Jawaharlal Nehru Road, Calcutta. The assessee company had let out different portions of the said property to various persons and the entire income by way of rent derived by the assessee company was being assessed to tax in its hands as business income. The assessee company had to pay a sum of Rs. 6,96,288/- in addition to the said sum of Rs. 2,66,612.50 to Laxmi Textile Mills Pvt. Ltd. in order to get vacant possession of 6,266 sq. ft. on the first floor of the said FIRPO building. The assessee company claimed the payment of Rs. 6,96,288 made to Laxmi Textile Mills Pvt. Ltd. as a business expenditure. The ITO disallowed the said claim for Rs. 6,96,288/- in computing the business income of the assessee company for the A.Y. 1983-84. This action of the ITO was confirmed by the CIT(A). According to the Tribunal, the payment of Rs. 6,96,288/- was made by the assessee company to Laxmi Textile Mills Pvt. Ltd. on grounds of commercial expediency in order to get vacant possession from unauthorised occupants, who entered into the premises through authorised channel. The Tribunal held that the payment of Rs. 6,96,288/- made by the assessee company was clearly a business expenditure and the same was deductible in computing its total income for the A.Y. 1983-84.

DECISION

The Hon'ble Court held that it was not made for acquiring any enduring benefit or income yielding asset. By avoiding certain business expenditure, the company could not be said to have acquired enduring benefit or any income yielding asset. The expenditure was of a revenue nature and was an allowable deduction in computing the profits of the assessee company. The expenditure in question was a revenue expenditure and was laid out wholly and exclusively for the purpose of the business of letting of properties. The assessee did not acquire any new asset, right or advantage of an enduring nature by making the payment of Rs. 6,96,288/- to Laxmi Textile Mills Pvt. Ltd.

Cases referred to :

1. *Commissioner of Agricultural Income-tax vs. Bombay Burmah Trading Corporation Ltd.* (1981) 131 154 (Ker.)
2. *CIT vs. Ashok Leyland Ltd.* (1972) Taxation XXXIII (1) 92; (1972) 86 ITR 459 (SC)
3. *Mather & Platt (India) Ltd. vs. CIT* (1987) Taxation 87(3) 65 (Cal.); (1987) 168 ITR 533 (Cal.).
4. *Chloride India Ltd. vs. CIT* (1981) 130 ITR 68 (Cal)
5. *CIT vs. Joy Ice-creams (Bangalore) Pvt. Ltd.* (1993) 112 Taxation 1 (Kar.); (1993) 201 ITR 894 (Kar.)

Full text of the Judgment is given below :

JUDGMENT

(Ajit K. Sengupta, J.)

In this reference made at the instance of the Revenue, the following questions have been referred by the Tribunal for the opinion of this court under section 256(1) of the Income-tax Act, 1961 :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that any expenditure incurred in the course of the assessee's business has to be treated as business expenditure and merits deduction ignoring the provisions of section 37(1) of the Income-tax Act, 1961, which provides that any business expenditure of capital nature is not allowable as a deduction?

2. Whether, on the facts and in the circumstances of the case and in view of the ratio of the decision of the Calcutta High Court in *Chloride India Ltd. vs. CIT* (1981) 130 ITR 61, the Tribunal was justified in law in holding that the expenditure of Rs. 6,96,288 incurred for acquiring a right to vacant possession is an allowable business expenditure ?"

The facts as found by the Tribunal are under :

This reference relates to the income-tax assessment of the assessee-company for the A.Y. 1983-84. The assessee-company is engaged, *inter alia*, in the business of taking properties on lease and letting these out for the purpose of earning income by way of rent. In the course of its aforesaid business, the assessee-company took on lease premises at 18A. B and C, Jawaharlal Nehru Road, Calcutta (commonly known as "FIRPO Building"). The assessee company had let out different portions of the said property to various persons and the entire income by way of rent derived by the assessee-company was being assessed to tax in its hands as business income. A portion of the first floor of the said FIRPO building measuring about 3,600 sq.ft. and 6,266 sq.ft., respectively, had been let out by the assessee-company to Sri Diresh Chakraborty in terms of two separate agreements executed on April 9, 1981, and July 27, 1981, respectively. Under both these two agreements, the tenant, Sri Chakraborty, had the right to sublet the premises let out to him by the assessee-company. In terms of the two agreements dated July 27, 1981, which were executed in respect of 6,266 sq. ft. in the first floor of the said premises, the tenant, Sri Chakraborty, had made a deposit of Rs. 4 lakhs with the assessee-company.

It appears that on or about February 1, 1992, the tenant, Sri Chakraborty, entered into an agreement with Laxmi Textile Mills Pvt. Ltd. for obtaining a loan of Rs. 10 lakhs. In order to secure the said loan, the tenant,

Sri Chakraborty, handed over the vacant possession of 6,266 sq. ft. in the first floor of the said FIRPO building to Laxmi Textile Mills Pvt. Ltd., and also offered his tenancy rights held by him in the first floor of the said FIRPO building in terms of the said two agreements dated April 9, 1981, and July 27, 1981. The tenant, Sri Chakraborty, also executed an irrevocable power of attorney in favour of the said Laxmi Textile Mills Pvt. Ltd. On May 29, 1982, Sri R.L. Gaggar, solicitor and advocate, acting for the said Laxmi Textile Mills Pvt. Ltd. issued a public notification in the newspaper indicating for general information that his clients, Laxmi Textile Mills Pvt. Ltd., were in exclusive possession of 6,266 sq. ft. of first floor of FIRPO building in place of Sri Chakraborty. On June 3 and 4, 1982, the tenant, Sri Chakraborty, sought to revoke his tenancy rights in terms of the two tenancy agreements with the assessee-company executed on April 9, 1981, and July 27, 1981, respectively. Sri Chakraborty requested the assessee-company to hand over the balance of his security deposit after due adjustments of his outstanding including arrears of rent, etc., to Laxmi Textile Mills Pvt. Ltd.

The assessee-company negotiated with Laxmi Textile Mills Pvt. Ltd. for the purpose of securing vacant possession of 6,266 sq. ft. at the first floor of FIRPO building which was in their possession and which had been originally let out by the assessee-company to Sri Chakraborty in terms of tenancy agreement executed on January 27, 1981. Laxmi Textile Mills Pvt. Ltd. agreed to hand over vacant possession of the said 6,266 sq. ft. of the first floor of the said FIRPO building provided they were paid all their dues receivable by them from Sri Chakraborty. The Income-tax Officer found that the balance of security deposit which was refundable by the assessee-company to its tenant, Sri Chakraborty, was Rs. 2,66,612.50 after making adjustments as to all charges including rent, etc. The assessee-company had to pay a sum of Rs. 6,96,288 in addition to the said sum of Rs. 2,66,612.50 to Laxmi Textile Mills Pvt. Ltd. in order to get vacant possession of 6,266 sq ft. on the first floor of the said FIRPO building. The assessee-company claimed the payment of Rs. 6,96,288 made to Laxmi Textile Mills Pvt. Ltd. as a business expenditure. After getting vacant possession from Laxmi Textile Mills Pvt. Ltd., the assessee-company was able to hire out the said 6,266 sq. ft. at the first floor of FIRPO building to a bank at a much higher rent and it also received substantial deposits from the new tenant, viz., the bank. The Income-tax Officer held that the expenditure of Rs. 6,96,288 was purely gratuitous and it had no legal obligation to make any payment to Laxmi Textile Mills Pvt. Ltd. According to the Income-tax Officer, this expenditure of Rs. 6,96,288 could not be said to have been incurred out of commercial expediency. He, therefore, disallowed the said claim for Rs. 6,96,288 in computing the business income of the assessee-company for the A.Y. 1983-84. This action of the ITO

was confirmed by the CIT(A). On further appeal by the assessee, the Tribunal held and observed that the assessee-company was admittedly engaged in the business of letting out properties. In the course of this business, it was usual for the assessee to get vacant possession from the old occupants and let out the same at a higher rent to new tenants. According to the Tribunal, the payment of Rs. 6,96,288/- was made by the assessee-company to Laxmi Textile Mills Pvt. Ltd. on ground of commercial expediency in order to get vacant possession from unauthorised occupants, who entered into the premises through authorised channel. The assessee-company was very much interested to protect its interest in the premises and for the purpose it was necessary to pay compensation to Laxmi Textile Mils Pvt. Ltd. The Tribunal found support in the decision of the Kerala High Court in *Commr. of Agrl. IT vs. Bombay Burmah Trading Corporation Ltd.* (1981) 131 ITR 154 and distinguished the decision of this court in *Mather and Platt (India) Ltd. vs. CIT* (1987) 168 ITR 533. The Tribunal held that the payment of Rs. 6,96,288/- made by the assessee-company was clearly a business expenditure and the same was deductible in computing its total income for the A.Y. 1983-84.

Before proceeding to consider the submissions made before us by counsel appearing for the assessee as well as the Revenue in this case, we would like to make some comments as to the two questions referred by the Tribunal in this court. The first question referred by the Tribunal at the instance of the Revenue in this case proceeds on the presumption that the Tribunal allowed deduction of Rs. 696,288 in this case as a business expenditure under section 37(I) of the Income-tax Act, 1961, even though capital expenditure was not deductible under the said section. We have gone through the order of the Tribunal and we did not find any argument advanced on behalf of the Revenue to the effect that the expenditure in question was a capital expenditure. In fact, the Tribunal has nowhere held that a business expenditure although capital in nature is deductible under section 37(1) of the said Act. Neither the Income-tax Officer nor the Commissioner of Income-tax (Appeals) nor even the Tribunal had ever held the said payment of Rs. 696,288 was a capital expenditure. Therefore, the first question referred by the Tribunal at the instance of the Revenue, in our view, does not arise out of the order of the Tribunal in this case.

The second question raised by the Revenue in this case proceeds on the presumption that the Tribunal allowed the payment of Rs. 6,96,288 as a business expenditure ignoring the decision of this Court *Chloride India Ltd. vs. CIT* (1981) 130 ITR 61. On a close reading of the decision of the Tribunal, we did not find any reference being made by the Revenue to the decision of this court in *Chloride India Ltd.'s* case (1981) 130 ITR 61. In fact, the decision in *Chloride India Ltd.'s* case (1981) 130 ITR 61 (Cal) was neither cited nor referred to or considered by any of the authorities including the Income-tax Officer, the Commissioner of Income-

tax (Appeals) as well as by the Tribunal. In that view, even the second question proceeds on an erroneous presumption which is contrary to the facts and records. While the present reference was being heard, we find that the Revenue had made another application under section 256(2) of the Income-tax Act, 1961. On the said application, we issued a rule on May 31, 1993, on the following question :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the expenditure of Rs. 6,96,288 is an allowable business expenditure ?"

The aforesaid rule was appearing in our list as "hearing of rule". Simultaneously, the aforesaid reference also came up in our list and was heard. In our view, the proper question for reference, in this case, should be the question as was framed by us while issuing the rule on the application made by the Revenue under section 256(2) of the said Act by our order of May 31, 1993. We proceed to answer the said question as set out in the preceding paragraph.

We would consider the aforesaid question as reframed by us as the only question which arises out of the order of the Tribunal and which incorporates the entire controversy involved in this case.

Counsel appearing for the Revenue reiterated before us that the amount of Rs. 6,96,288 paid by the assessee by way of compensation to Lakshmi Textile Mills Pvt. Ltd. was a gratuitous payment made voluntarily and without any legal obligation and for considerations other than commercial expediency. The assessee-company obtained benefit or advantage of an enduring nature by making the aforesaid payment and, therefore, the expenditure in question was capital in nature and not deductible in computing the business income. Reliance on behalf of the Revenue was placed on the two decisions of this court in *Chloride India Ltd. vs. CIT* (1981) 130 ITR 61 as well as in *Mather and Platt (India) Ltd. vs. CIT* (1987) 168 ITR 533. It was also contended on behalf of the Revenue, relying upon the decision of the Karnataka High Court in *CIT vs. Joy Ice-creams (Bangalore) Pvt. Ltd.* (1993) 201 ITR 894, that if the receipt of compensation by a tenant for surrender of tenancy rights was a capital receipt in the hands of the tenant, the payment by the landlord to the tenant to obtain vacant possession must be considered as a capital expenditure.

Mr. Murarka, learned counsel appearing for the assessee, on the order hand, drew our attention to the findings of fact recorded by the Tribunal to the effect that the payment of Rs. 6,96,288 in question was made by the assessee-company on grounds of commercial expediency and in the course of its business of letting out premises to different tenants and earning rental income therefrom. The assessee was able to let out the same space to the bank at a higher rent soon after getting the area vacated from Laxmi Textile Mills Pvt. Ltd. on payment of Rs. 6,96,288. By making payment of the

said amount, the assessee did not acquire any leasehold and/or tenancy rights in the said property. The assessee was already occupying the said property on lease. The two decisions of this court, relied upon by counsel appearing for the Revenue, were, therefore, clearly distinguishable. Sri Murarka submitted that the decision of the Kerala High Court in *Commr. of Agrl. I.T. vs. Bombay Burmah Trading Corporation Ltd.* (1981) 131 ITR 154 clearly supported the case of the assessee. He also further submitted that the nature of a receipt in the hands of the payee was wholly irrelevant to decide the nature of the expenditure in the hands of the person making the payment and in this respect he drew our attention to the decision of the Supreme Court in *CIT vs. Ashok Leyland Ltd.* (1972) 86 ITR 549. Sri Murarka also submitted that the payment in question was made by the assessee to remove the recurring disadvantage of having Laxmi Textile Mills Pvt. Ltd. with whom the assessee-company had no contractual relationship and, therefore, the expenditure in question was nothing but revenue in nature.

We have considered the submission made on behalf of the Revenue as well as the assessee. At the outset, we would like to deal with the various cases cited before us on behalf of the assessee as well as the Revenue.

In *Chloride India Ltd. vs. CIT* (1981) 130 ITR 61 (Cal), the assessee-company had taken on lease certain premises which were occupied by Messrs. Gasper and Co. In order to obtain vacant possession of the premises, the assessee paid Rs. 4,50,000 to Messrs. Gasper and Co. and claimed it as revenue expenditure. The Tribunal found that before the assessee took on lease the said premises, Messrs. Gasper and Co. were already occupying the same as tenant under the lessor and its tenancy had not been terminated. Messrs. Gasper and Co. had the right to be in possession in view of section 108(c) of the Transfer of Property Act, 1882. This was a legal right to possession and the same was with Messrs. Gasper and Co. This legal right to possession was a capital asset and this the assessee had acquired by incurring an expenditure of Rs. 4,50,000. This court held that this was nothing but a capital expenditure. The facts of this case, in our view, are clearly distinguishable from the present case. There a third party induced the existing lessee to assign the lease in favour of the third party and became the lessee in place of the existing lessee. The assessee in this reference was all along holding the leasehold rights in respect of the FIRPO building. At the relevant time, Laxmi Textile Mills Pvt. Ltd.were not in occupation of any portion of FIRPO building. In fact, the assessee had let out the area in question to Sri Dhiresh Chakraborty as a tenant under the lease. Sri Chakraborty, in his turn, sought to assign his tenancy right in favour of Laxmi Textile Mills Pvt. Ltd. In fact, on June 3 and 4, 1982, the original tenant of the assessee, Sri D. Chakraborty, had already revoked his tenancy rights in terms of the two tenancy agreements entered into with the assessee-company on April 9, 1981, and July 27, 1981. In these circumstances,

the continuation of Laxmi Textile Mills Pvt. Ltd. in the aforesaid premises which were held by the assessee-company on lease was nothing but an impediment to the carrying on the business of letting out by the assessee-company. By clearing the leasehold right of unauthorised occupancy the asssessee did not acquire any new right or title as such. In fact, this court in *Chloride India Ltd.'s* case (1981) 130 ITR 61 held and observed as under at page 72 of the report :

> "It is true that if the petitioner had a right to possession aliunde or independently of the transaction with Messrs. Gasper and Co. which is the subject-matter here, then by incurring the expenditure, the assessee would not have acquired any title or right, as such. The assessee would have merely removed the impediment to its carrying on the business or fully neutralised their asset. But, in the instant case, the Tribunal has found that Gasper was, in fact, a tenant and it has not been found that the tenancy of Gasper had, in fact, been terminated by the original lessor before the transaction with the assessee took place. Therefore, it has not been found by the Tribunal that Messrs. Gasper and Co. was continuing as one whose tenancy had expired and it was merely holding over under the Transfer of Property Act .... On the other hand, the Tribunal is categorical in its finding, in view of section 108(c) of the Transfer of Property Act, that Messrs. Gasper and Co. had the right to be in possession."

The aforesaid observation makes it quite clear that the decision in *Chloride India Ltd.'s* case (1981) 130 ITR 61 (Cal) far from supporting the Revenue *actually supports the respondent-assessee in this case. As already mentioned* earlier, the respondent-assessee was holding FIRPO building on leasehold basis. It was the respondent-assessee who had let out a portion of the first floor of the said premises to Sri Chakraborty. This tenancy had also been revoked by Sri Chakraborty on June 3 and 4, 1982. Laxmi Textile Mills Pvt. Ltd. had no privity of contract with the respondent-assessee. In these circumstances, the removal of Lakshmi Textile Mills Pvt. Ltd. who had been inducted by Sri Chakraborty was nothing but an attempt on the part of the assessee-company to remove the impediment to the carrying on of its business.

The next decision cited by counsel appearing for the Revenue is the decision of this court in *Mather and Platt (India) Ltd. vs. CIT* (1987) 168 ITR 533. In this case, the assessee incurred expenditure aggregating Rs. 15,082 with the object of securing two leases of premises at Delhi and Calcutta. The said leases were for the respective periods of 15 and 20 years and the leasehold premises were intended to be used by the assessee as its business offices. Fees were paid to the lawyers of the assessee in connection with the said leases and for the registration of the lease of the premises at Calcutta, the assessee incurred further expenditure. All these expenses were claimed by the assessee as revenue in nature. This court held that

under a lease the lessee obtains a right to property under the Transfer of Property Act and such property is a capital asset. Expenditure incidental in the acquisition of the lease would be expenditure of a capital nature. The primary and dominant object of the assessee in incurring the said expenditure was to acquire benefits of a right to property under the leaseholds. The periods of the two leases were sufficiently long and resulted in an enduring benefit to the assessee. The expenditure was, therefore, held to be of capital nature. The facts as set out by us hereinabove would clearly indicate that the decision of this court in *Mather and Platt (India) Ltd.* (1987) 168 ITR 533 is also distinguishable. The respondent-assessee, in this case, did not acquire any leasehold rights in the FIRPO building by making the payment to Laxmi Textile Mills Pvt. Ltd. The respondent-assessee was, in fact, already holding such leashold rights. By making payment to Laxmi Textile Mills Pvt. Ltd., the respondent-assessee was only able to remove the unauthorised occupant creating an impediment to the commercial exploitation of the lease right. Therefore, the decision in the case of *Mather and Platt (India) Ltd.* (1987) 168 ITR 533 (Cal.) has no application in the facts and circumstances of the case.

Counsel for the assessee drew our attention to the decision of the Kerala High Court in *Commr. of Agrl. I.T. vs. Bombay Burmah Trading Corporation Ltd.* (1981) 131 ITR 154. In this case, it was found by the Tribunal that the assessee had incurred an expenditure of Rs. 5,312.35 in the previous year relevant to the assessment year 1968-69 under two heads, viz., for the eviction of a tenant from a building within the estate premises, and, secondly, for filing a writ petition challenging the legality of the levy of some toll. The Tribunal took the view that the first item aforementioned was an expenditure incurred to protect the appellant's title to the property. The Kerala High Court, on a reference, agreeing with the Tribunal, held that the eviction of a quondam tenant who was in occupation of a shop situated within the estate of the assessee, was a step necessary for the protection of the estate from which income was being derived by the assessee and for the preservation of the undisturbed rights of the assessee to peacefully collect the income from the said estate and as such it had a direct nexus with the earning of the agricultural income. This case clearly supports the assessee. In this reference too, it has been found by the Tribunal that by making a payment of Rs. 6,96,288 to Laxmi Textile Mills Pvt. Ltd., the assessee was able to obtain possession of the portion of the first floor of FIRPO building which was in the occupation of Laxmi Textile Mills Pvt. Ltd. without there being any contract with the respondent-assessee. The assessee was able to let out the same space to the bank at higher rate soon after getting the area vacated by Laxmi Textile Mills Pvt. Ltd. By making payment of the said amount, the assessee did not acquire any leasehold and/or tenancy rights in the said property. Therefore, the payment of Rs. 6,96,288 made by the respondent-assessee was an expenditure incurred

on grounds of commercial expediency and was revenue in nature. In *CIT vs. Ashok Leyland Ltd.* (1972) 86 ITR 549 (SC), the assessee-company had appointed Car Builders Ltd. as their managing agents under an agreement dated October 18, 1948, for a term of 14 years from the date of its registration. The managing agents were to be paid at the rate of Rs. 2,000 per month as office allowance and ten per cent of the annual profits with a minimum of Rs. 18,000 per annum in respect of inadequacy and/or in the absence of profit. On January 29, 1955, by means of the agreement between the company and the managing agents, the managing agency agreement was terminated on payment of compensation of Rs. 2,50,000. This compensation was claimed by the assessee-company as a revenue expenditure laid out wholly and exclusively for the purpose of business. It was held by the Supreme Court that the compensation paid for termination of the services of the managing agent was a payment made with a view to save business expenditure in the accounting period as well as a few subsequent years; it was not made for acquiring any enduring benefit or income-yielding asset. By avoiding certain business expenditure, the company could not be said to have acquired enduring benefit or any income-yielding asset. The expenditure was of a revenue nature and was an allowable deduction in computing the profits of the assessee-company. This case also supports the respondent-assessee in this reference. If the assessee-company had taken legal proceedings against Laxmi Textile Mills Pvt. Ltd., it could have incurred huge legal expenses and substantial time might have been spent in getting the leasehold premises vacated from Laxmi Textile Mills Pvt. Ltd. By making payment of the said sum of Rs. 6,96,288, the assessee-company was able to remove Laxmi Textile Mills Pvt. Ltd. forthwith and to let out the very same space to the bank at a much higher rent and also receive substantial deposits from the new tenant. These facts clearly go to support the case of the respondent-assessee that the expenditure in question was a revenue expenditure and was laid out wholly and exclusively for the purpose of the business of letting of properties. The assessee did not acquire any new asset, right or advantage of an enduring nature by making the payment of Rs. 6,96,288/- to Laxmi Textile Mills Pvt. Ltd. We do not consider it necessary to deal with the various other cases cited on behalf of the assessee in this case.

The first question does not arise out of the order of the Tribunal and we, therefore, decline to answer the first question.

The second question as reframed is answered in the affirmative and in favour of the assessee.

There will be no order as to costs.

Nure Alam Chowdhury, J. — I agree.

(1995) 126 Taxation 243 (Del.)

IN THE HIGH COURT OF DELHI

(Before Hon'ble Mr. Justice K. Shivashankar Bhat & Hon'ble Mr. Justice D.K. Jain)

IT Case No. 35 of 1992

Muthoot M. George Chits (India) Ltd.
vs.
Commissioner of Income-tax

For the Appellant	:	**D.N. Sawhney**
For the Respondent	:	**B. Gupta and R.K. Chaufla**
Decided on	;	31.8.1994

REFERENCE TO HIGH COURT — Assessee engaged in business of chit fund — Assessee buying its own chit in auction — Incurring loss — Claiming loss as an expenditure — Tribunal holding activity of contributing and bidding its own chit resulted in mutual transaction and on the principle of mutuality loss not allowable — Assessee not filing any reference but filing rectification u/s 254(2) — Application of assessee dismissed — Reference sought by assessee — Held, miscellaneous application did not give rise to any question of law — No reference sought against the original order — Tribunal rightly declining to refer any question relating to original order.

Income-tax Act, 1961 — Section 256(2).

FACTS

The assessee company is engaged in the business of chit funds. In respect of the A.Y. 1981-82, it claimed an expenditure of Rs. 5,68,500/- as the amount paid by it as bid on its own chits. The Assessing Officer was of the view that profit/loss on a chit could only be worked out when the chit matures, i.e. when all the instalments have been paid. Accordingly, after deducting the dividend received by the assessee on its own chits (Rs. 1,90,095) from the aforesaid amount of Rs. 5,68,500/-, he added back the balance amount of Rs. 3,78,405/- to the total income of the assessee. The CIT(A) accepted the assessee's appeal and deleted the addition. The Tribunal came to the conclusion that though there is no dispute to the fact that the assessee does carry on the chit fund business and the receipts for specific services rendered are taxed u/s 28(iii) of the said Act but its activity which involves contributing its own chits, bidding of own chits and suffering losses on own chits, are all related to mutual transactions between itself and the other subscribers and, therefore, bid amount on own chits and the commission amounts, being related to mutuality were outside the ambit of the Act and, hence, neither the expense claimed was allowable nor the income shown to this extent was taxable. The assessee did not file any reference but moved

an application purported to be u/s 254(2) of the Act. The Tribunal dismissed the application. Being aggrieved, the petitioner filed an application u/s 256(1) requiring the Tribunal to refer the aforementioned question. The Tribunal dismissed the application on the ground that it was purely a question of fact and no question arose out of its aforesaid order.

DECISION

Under the provisions of Section 254(4), the Tribunal's order dated 21.5.1990 became final and unless a reference application on questions arising from the original order on the appeal was filed, correctness of this order could not be challenged in a reference application challenging the correctness of the order made u/s 254(2). The application was dismissed.

Full text of the Judgment is given below :

JUDGMENT

(D.K. Jain, J.)

By this application under section 256(2) of the Income-tax Act, 1961 ('the Act') the assessee seeks a direction to the Tribunal to state the case and refer the following questions, stated to be one of law, for the opinion of this Court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the miscellaneous application of the appellant was an attempt to review the order of the Tribunal and not a petition pointing out mistakes in the order which were apparent from the record ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the arguments of the appellant in the miscellaneous petition were based on misconception and wrong appreciation of facts?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that 5 per cent of the chit amount appropriated by the company as foreman's commission was adequate for meeting the expenses of various services to be rendered as foreman, like expenses on administration and other staff ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in not rectifying its mistaken conclusion in the appeal wherein it had stated that the aspect of mutuality applies to the appellant ?

5. Whether the Tribunal was correct in law in interpreting that section 28(iii) is applicable, when the appellant is admittedly carrying on chit fund business receiving commission, is a trading concern and not a trade association?

6. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in arriving at its mistaken conclusion that the aspect of mutuality applied to the assessee-company relying upon the decision of the Punjab and Haryana High Court in the case of *Soda Silicate & Chemical Works vs. CIT* (1989) 179 ITR 588?

7. Without prejudice to the foregoing grounds, assuming principles of mutuality applies, as decided by the Tribunal, and on the same parity of its reasoning whether the commission income of Rs. 2,06,500 is also not taxable since the appellant is also a member in every chit series from which the commission is collected vide paper book pages 14 to 24 given to Tribunal ?

8. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in rejecting the claim of 6th appellant of mercantile system of accounting regularly followed under section 145 of the Income-tax Act, 1961 and not accepting the loss of Rs. 5,68,600/- incurred upon bidding by the company during the year ?"

Briefly stated, the facts are that the assessee company is engaged in the business of chit funds. In respect of the A.Y. 1981-82, it claimed an expenditure of Rs. 5,68,500/- as the amount paid by it as bid on its own chits. The Assessing Officer was of the view that profit/loss on a chit could only be worked out when the chit matures, i.e. when all the instalments have been paid. Accordingly, after deducting the dividend received by the assessee on its own chits (Rs. 1,90,095/-) from the aforesaid amount of Rs. 5,68,500/-, he added back the balance amount of Rs. 3,78,405/- to the total income of the assessee. The CIT(A) accepted the assessee's appeal and deleted the addition. The revenue preferred appeal to the Tribunal, which, by its order dated 21-5-1990, came to the conclusion that though there is no dispute to the fact that the assessee does carry on the chit fund business and the receipts for specific services rendered are taxed u/s 28(iii) of the said Act but its activity which involves contributing its own chits, bidding of own chits and suffering losses on own chits, are all related to mutual transactions between itself and the other subscribers and, therefore, bid amount on own chits and the commission amounts, being related to mutuality were outside the ambit of the Act and, hence, neither the expense claimed was allowable nor the income shown to this extent was taxable.

It appears that the assessee did not file any reference application against the said order but instead moved an application purported to be u/s 254(2) of the Act, for recall of order dated 21.5.1990 on the ground that the Tribunal had committed an apparent mistake. By its order dated 6.11.1990 the Tribunal dismissed the application and while doing so observed as under:

"The arguments as advanced in paras 3, 3.1 and 3.2 in regard to section

28(3) its interpretation, retention of 5 per cent commission by the foreman as forwards specific services rendered is based on misconception and wrong appreciation of facts. The facts as founded by the Tribunal on the evidence provided are indicative that out of every bid or auction, the company reserves the right to appropriate 5 per cent of the chit amount and if this were not for meeting the various services to be rendered as a foreman who requires assistance of administration and other staff, what for it is retained. Coming to the aspect of the mutuality not being applicable to the assessee in view of there being specific services rendered only to members and to any outsiders reliance has been placed by the Tribunal in the Punjab & Haryana High Court decision, the arguments as advanced in paras 3.1 & 3.2 are fresh lines of argument being raised in this miscellaneous application. With regard to various submissions contained in para 4 onwards the intention of the assessee is clearly one of the review of the order for the aspect of mutuality be found applicable on the basis of the Punjab & Haryana High Court decision (supra). The miscellaneous application is an attempt to review of the Tribunal, hence the same is dismissed."

Being aggrieved, the petitioner filed an application u/s 256(1) requiring the Tribunal to refer the aforementioned questions.

By its order dated 13.6.1991, the Tribunal dismissed the application on the ground that it was purely a question of fact and no question arose out of its aforesaid order in the miscellaneous application as questions posed were only the submissions made by the assessee in rectification application but no fresh finding thereon had been recorded by the Tribunal.

Mr. Sawhney, the learned counsel for the assessee, has submitted that the original order of the Tribunal dated 21.5.1990 having merged in its order, dated 6.11.1990, on assessee's rectification application, the assessee could raise all the issues which were the subject-matter of the main appeal.

In our opinion there is no merit in the contention. Under the provision of Section 254(4), the Tribunal's order dated 21.5.1990 became final and unless a reference application on questions arising from the original order on the appeal was filed, correctness of this order could not be challenged in a reference application challenging the correctness of the order made u/s 254(2), particularly when admittedly the Tribunal did not record any fresh finding on the merits of the case in its later order. We are in complete agreement with the Tribunal that question Nos. 3 to 8 do not arise out of its order dated 6.11.1990. Insofar as questions 1 and 2 are concerned, the answer to the questions raised is self-evident and there is no reason to direct the Tribunal to state the case for referring any question.

There is no merit in the application. Dismissed with no order as to costs.

(1995) 126 Taxation 247 (Ker.)

IN THE HIGH COURT OF KERALA

(Before Hon'ble Mr. Justice T.L. Viswanatha Iyer)

Original Petition No. 5421 of 1992

Cochin Plantations Ltd.

vs.

Inspecting Asstt. Commissioner of Agricultural Income-tax & Sales-tax

For the Appellant	:	**Premjith Nagendran**
For the Respondent	:	**S. Vijayan Nair**
Decided on	:	3.3.1994

RE-ASSESSMENT — Notice for re-assessment issued — Notice indicating return to be filed by 30.3.1992 — Notice served on 24.3.1992 — Validity of the notice challenged — Held, notice for re-assessment giving less than 30 days time to file the return invalid — Consequently all proceedings including re-assessment order invalid.

Kerala Agricultural Income-tax Act, 1950 — Section 35.

Kerala Agricultural Income-tax Act, 1991 — Section 41.

FACTS

The petitioner was served with a notice dated 24.3.1992 from the IAC (AIT & ST), Kottayam, referred u/s 35 of the 1950 Act read with Section 99 of the Kerala Agricultural I.T. Act, 1991 intimating the petitioner that its agricultural income for the year 1986-87 has either escaped assessment or been the subject of excessive relief and, therefore, calling upon the petitioner to deliver a return of its income assessable for the said year 'not later than 30.3.1992'. The notice was served on 24th March itself. The petitioner objected to the reopening of the assessment but the objections were ruled out.

DECISION

The Hon'ble Court held that the notice which forms the foundation of the re-assessment proceedings, was invalid, null and void as it did not comply with the requirements of section 35(1) of the 1950 Act or section 41(1) of the 1991 Act. These provisions which enable the Agricultural ITO to reopen an assessment prescribe that the officer shall serve on the assessee, within the time specified, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 17 or sub-section (2) of section 35 of the respective Acts. One of these requirements is the grant of a minimum of thirty days, time to furnish a return in the prescribed form containing the requisite particulars. The grant of thirty days time to furnish the return is imperative and the direction to furnish

the return within any lesser period invalidates the notice and all tl proceedings taken pursuant thereto. The notice served on the petition on 24.3.1992 calling upon him to furnish the return not later than 30.3.199: The law remains well settled that (a) the service of a notice u/s 35 of t' 1950 Act corresponding to section 41 of the 1991 Act is condition precede for the validity of the proceedings to reopen an assessment; (b) the noti so issued should be a valid notice; (c) the notice is not valid if it allov only a period of less than thirty days to file the return. The notice whi was served on the petitioner on 24.3.1992, gave it only six days time file the return on 30.3.1992. Therefore, it is clearly invalid and not sufficie to sustain the proceedings u/s 35. The original petition is, therefor allowed.

Cases referred to :

1. *Y. Narayana Chetty vs. ITO* AIR 1959 SC 213
2. *CIT vs. Ramsukh Motilal* AIR 1955 Bom. 227
3. *Commissioner of Agricultural I.T. vs. Amalgamated Coffee Estat Ltd.* (1962) 45 ITR 348 (Ker.)
4. *George vs. Agricultural ITO* 1983 KLT 1049.

Full text of the Judgment is given below :

JUDGMENT

(T.L. Viswanatha Iyer, J.)

The petitioner, a public limited company, owning agricultural lands, wa assessed to tax under the Agrl. IT Act, 1950 (Kerala), hereinafter referre to as the 1950 Act, for the asst. yr. 1986-87, corresponding to th accounting year 1st May, 1984 to 30th April, 1985. This order of asse ment Ext. P3 made by the IAC of Agrl. IT, Kollan is dt. 23rd April, 198 and determined the accumulated loss to be carried forward to the next ye at Rs. 4,44,200 after setting off the loss carried forward from the previo year, namely Rs. 7,77,200 against the income of Rs. 3,33,000 for th current year. The order was rectified on 5th June, 1986 by another ord Ext. P4 refixing the loss to be carried forward at Rs. 2,28,060. The ord Ext. P4 was not challenged and became final.

Long thereafter, the petitioner was served with a notice Ext. P4 date 24.3.1992 from the IAC (AIT & ST), Kottayam, referred to hereinaft as the Kottayam Officer, u/s 35 of the 1950 Act, r/w s. 99 of the Ker Agricultural I.T. Act, 1991 (15 of 1991) (which replaced the 1950 A w.e.f. 1st April, 1991), hereinafter referred to as the 1991 Act, intimatir the petitioner that its agricultural income for the year 1986-87 has eith escaped assessment or been the subject of excessive relief and, therefor calling upon the petitioner to deliver a return of its income assessable fo the said year 'not later than 30.3.1992'. The notice was served on 24

March itself. The petitioner objected to the reopening of the assessmen by its reply Ext. P6, but the objections were overruled and a fresh assessmen completed on 31st March, 1992, determining an income of Rs. 5,49,142 as taxable for the year (as against the loss of Rs. 2,28,060 fixed undei Exts. P3 and P4) and demanding an amount of Rs. 3,29,484 as tax payable for the year. A true copy of this assessment is Ext. P7 and that is undei challenge in this writ petition filed under Art. 226 of the Constitution.

The reassessment under Ext. P7 is challenged on various grounds. I shal deal with them *seriatim*, but before proceeding to do so, I may mentior that the 1950 Act was repealed and replaced by the 1991 Act w.e.f. 1st April, 1991. There is no case for the petitioner that the proceedings initiatec by the notice Ext. P5 and culminating in the order of assessment Ext. P7 are incompetent because of the repeal and the re-enactment in the meanwhile

The first point raised is one of jurisdiction. According to the petitioner its files had been transferred from Kollam to the IAC at Ernakulam (th Ernakulam Officer) and, therefore, the Kottayam Officer had no jurisdiction to take any proceedings for reassessment as he had no seisin of the case Petitioner refers to some letters Exts. P8 to P10 received by it from the Ernakulam Officer in support of this plea. But it has been pointed out ir the counter-affidavit of the respondents that the Kottayam Officer was havinc jurisdiction in the matter since 1st Oct., 1991, by virtue of the proceeding of the Board of Revenue of even date and that the transfer to the Ernakularr will take effect only after completion of the assessments which will get time barred on 31st March, 1992. That is the position here. There is, therefore no substance in the plea of want of jurisdiction in the Kottayam Officer

The next point is one of limitation, but I do not find any substance in thi submission as well. The reassessment Ext. P7 was completed on 31st March 1992 after the proceedings were initiated by service of the notice undei s. 35 of the 1950 Act on 24th March. The assessment year concernec is 1986-87 (i.e., year ending 31st March, 1987) corresponding to th petitioner's accounting year ending 30th April, 1985. Sub-s. (1) of s. 35 of the 1950 Act enables initiation of proceedings for assessment of income which has escaped assessment for any financial year by service of a notic on the assessee at any time within five years of the end of that year. Sub s. (2) says that no order of reassessment shall be made after the expir of five years from the end of the year in which the agricultural income was first assessable; and the proviso thereto lays down that once the notic is issued within the time so limited, the reassessment may be made withir another period of one year from the date of service of the notice. Sec 41 is the corresponding provision in the 1991 Act. It provides for a longei period of ten years for reopening an assessment though sub-s. (2) therec limits the period to five years unless the Commr. of Agrl. IT is satisfiec on the reasons recorded by the Agrl. ITO that it is a fit case for issue c notice to reopen the assessment. According to the petitioner, th

Commissioner has not recorded his satisfaction in this case and, therefore, going even by the terms of s. 41 of the 1991 Act, the reassessment is barred.

The proceedings have been initiated by the notice Ext. P5 issued under s. 35 of the 1950 Act. Though the petitioner has a contention that s. 35 is inapplicable after the repeal of the 1950 Act, and that the proceedings could if at all, be only under s. 41 of the 1991 Act, I am unable to uphold it is the light of the provisions contained in s. 99(3) of the latter Act, reserving power, *inter alia*, to initiate proceedings for assessment of escaped agricultural income, under the repealed enactment. Even otherwise, I do not find anything in substance in this contention apart from the technicality of it, as the initiation of the proceedings by Ext. P5 is well within the time limit, whether it is under s. 35 of the 1950 Act or s. 41 of the 1991 Act.

The period of time fixed for service of the notice contemplated by sub-s. (1) of s. 35 of the 1950 Act or sub-s. (2) of s. 41 of the 1991 Act is five years from the end of the financial year in which the income has escaped assessment. Sec. 2(j) of the 1950 Act defines "financial year" as the year beginning on the first April and ending on the thirty first March next following Sec. 3 of this Act provides for the levy of agricultural income-tax for each financial year in accordance with or subject to the provisions of the Act. The financial year under this Act is the assessment year as is commonly known, though that term is not as such defined or used in the Act. The 1991 Act does not define a "financial year" but contains a definition of "assessment year" in its s. 2(9) as the period of twelve months commencing on the 1st April, every year. The charge to tax under s. 3 is for each assessment year on the total agricultural income of the previous year. Sec. 41, however, used the word "financial year". Evidently, the expression "financial year" in s. 41 means only the assessment year as the tax is levied in each assessment year and the escape from assessment could only be with reference to that year.

The period of five years is thus liable to be reckoned, under either of the enactments only from the end of the assessment year concerned, which in this case is 1986-87, i.e., the year ending 31st March, 1987. The period of five years thus expired only on 31st March, 1992 and, therefore, the order Ext. P7 passed on that day is within time. This contention is, therefore, overruled.

The plea which is substantial and which has got to be accepted is the next one raised by the petitioner, namely, that the notice Ext. P5, which forms the foundation of the reassessment proceedings, was invalid, null and void as it did not comply with the requirements of section 35(1) of the 1950 Act or section 41(1) of the 1991 Act. These provisions which enable the Agricultural ITO to reopen an assessment prescribe that the officer shall serve on the assessee, within the time specified, a notice containing all

or any of the requirements which may be included in a notice under sub-section (2) of section 17 or sub-section (2) of section 35 of the respective Acts. One of these requirements is the grant of a minimum of thirty day's time to furnish a return in the prescribed form containing the requisite particulars. The grant of thirty days' time to furnish the return is imperative and the direction to furnish the return within any lesser period invalidates the notice and all the proceedings taken pursuant thereto. The notice Ex. P5 served on the petitioner on 24.3.1992 calling upon him to furnish the return not later than 30.3.1992. It is, therefore, pointed out that it was insufficient to sustain the reopening of the assessment.

In my opinion the position of law as set forth by the petitioner admits of no doubt, but it is useful occasionally to recapitulate the law, lest the basics are overlooked as has evidently happened in this case.

The provisions concerned correspond to s. 34 of the Indian IT Act, 1922, which has been the subject of consideration in a number of decisions. In *Y. Narayana Chetty vs. ITO* AIR 1959 SC 213, the Supreme Court held that the service of a valid notice as required by the section constitutes the very foundation of the jurisdiction of the ITO to reopen an assessment and, therefore, failure to serve such notice or any invalidity in the notice will render the proceedings illegal and void.

Gajendragadkar, J. observed :

> "The notice prescribed by s. 34 cannot be regarded as a mere procedural requirement; it is only if the said notice is served on the assessee as required that the ITO would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid, then the validity of the proceedings by the ITO without a notice or in pursuance of an invalid notice would be illegal and void. That is the view taken by the Bombay and Calcutta High Courts in *CIT vs. Ramsukh Motilal* (1955) 27 ITR 54 (Bom): AIR 1955 Bom 227, and *R.K. Das & Co. vs. CIT* (1956) 30 ITR 439 (Cal) : AIR 1955 Cal 161 and we think that, that view is right."

Narayana Chetty was a case of non-issue of notice to the assessee under s. 34 but the case of *CIT vs. Ramsukh Motilal* AIR 1955 Bom. 227 approved therein was one in which precisely the same question as in this case, arose for consideration. The time allowed for filing the return in the notice under s. 34 was less than the period of thirty days prescribed in s. 22(2) which correspond to s. 17(2) of the 1950 Act and s. 35(2) of the 1991 Act. Chagla, C.J. speaking for the Court declared the law as under :

> "Each of the three requirements mentioned in s. 22(2) is qualified by the legislature providing that the notice must give time to the assessee to comply with the requirement within a period which cannot be shorter than 30 days. The requirement is not merely to make a return or to verify or to give particulars. The requirement is in each case that the

return must be made, the verification must be made, or the particulars must be given within a period of not less than 30 days. Therefore, it is clear that if a notice under s. 34 embodies any of the requirements under s. 22(2), it must at the same time permit the assessee to comply with the requirement within a period which is not less than 30 days. If the period is shorter than 30 days, then the requirement is not the requirement as set out in s. 22(2). In this case, the notice gave only six days to make a return under s. 34. Therefore, the requirement was different from the requirement under s. 22(2) and the notice was clearly bad."

In *Commr. of Agrl. IT vs. Amalgamated Coffee Estates Ltd.* (1962) 45 ITR 348 (Ker) a notice under s. 35 of the Madras Plantations Agrl. IT Act, 1955, which did not give thirty days' time to give particulars was held defective and the assessment made pursuant thereto, illegal and void. *George vs. Agrl. ITO* 1983 KLT 1049 was a similar case where a notice granting a lesser time to file return under s. 35 of the 1950 Act was held invalid (see also *CIT vs. Nanalal Tribhovandas* (1975) 100 ITR 734 (Guj). It is unnecessary to multiply authorities. The law remains well settled that (a) the service of a notice u/s 35 of the 1950 Act corresponding to section 41 of the 1991 Act is condition precedent for the validity of the proceedings to reopen an assessment; (b) the notice so issued should be a valid notice; (c) the notice is not valid if it allows only a period of less than thirty days to file the return.

I shall now turn to the facts of this case. The notice Ext. P5 which was served on the petitioner on 24.3.1992, gave it only six days' time to file the return on 30.3.1992. Therefore, it is clearly invalid and not sufficient to sustain the proceedings u/s 35. The order Ext. P7 is, therefore, unsustainable in law.

The original petition is, therefore, allowed. The notice Ext. P5 and the order of assessment Ext. P7 are quashed.

(1995) 126 Taxation 252 (Ker.)

IN THE HIGH COUR OF KERALA

(Before Hon'ble Mr. Justice T.L. Viswanatha Iyer)

O.P. Nos. 14074 of 1993 & 244 of 1994

K. Oormila Maloor

vs.

Assistant Commissioner of Income-tax

For the Appellant	:	**B. Krishna Mani**
For the Respondent	:	**P.K. Ravindranatha**
Decided on	:	23.3.1994

WRIT PETITION — Assessment completed ex-parte — Assessee

filing an appeal u/s 246 — Assessee blaming and causing aspertion on his auditor — Assessee further claiming ex-parte assessment completed for non-supply of material by auditor — Writ filed for quashing ex-parte assessment — Held, matter subjudice in appeal — High Court not required to adjudicate on the allegations against the auditor — Petitioner asked to move appropriate authority both for hearing of appeal and stay of demand — Writ petition not maintainable hence dismissed.

Income-tax Act, 1961 — Section 246.

Constitution of India — Article 226.

FACTS

According to the petitioners, they were not in a position to file returns for purposes of assessment to income-tax for the A.Y. 1990-91 for the reason that the books were not available to them and also for the reason that they had no faith in the audit which had been done by the firm of auditors who were made parties in the suit against and whom there were very serious allegations. In these circumstances, they could not file any return and this eventually resulted in the ex-parte orders of assessment in the case for the year 1990-91. The prayer ultimately is to quash the order of assessment as illegal and unjust one.

DECISION

Held that the Court cannot embark on an enquiry on these matters nor it is necessary for the reason that the petitioners have admittedly filed appeals against those assessments u/s 246 of the IT Act. It is admitted that such an appeal has been filed and that it is pending. In the circumstances it is only proper to direct that the said appeals should be disposed of expeditiously with appropriate direction regarding the recovery proceedings. As regards the recovery, the Court left the matter to discretion of the revenue to be dealt with proper exercise of the discretion.

Full text of the Judgment is given below :

JUDGMENT

(T.L. Viswanatha Iyer, J.)

The two petitioners were partners of two firms M/s M.M. Nagalinga Nadar & Co., Quilon and Sri Rajvel & Co., Quilon. There appears to be a raging dispute between the partners of the firms with an (Arbitration) Original Suit No. 69 of 1993 pending in the Sub Court, Kollam. The petitioners have made various allegations against the other partners of the firms and also against the Chartered Accountants of the firms. That suit is pending. According to the petitioners, they were not in a position to file returns for purposes of assessment to income-tax for the A.Y. 1990-91 for the reason that the books were not available to them and also for the reason

that they had no faith in the audit which had been done by the firm of auditors who were made parties in the suit against and whom there were very serious allegations. In these circumstances, they could not file any return and this eventually resulted in the order of assessment Ext. P5 in each case for the year 1990-91. The petitioners have got various allegations to make regarding the conduct of the auditors, regarding the conduct of the other partners as also about various other matters on which I do not think, this Court should address itself at this stage. The prayer ultimately is to quash the order of assessment as an illegal and unjust one.

It is not for this Court to adjudicate on the various points raised by the petitioners in the two original petitions. Suffice it to say, many of them are matters concerning the suit requiring adjudication in the suit. Many of them are also matters which require adjudication at the Departmental level having regard to all that the petitioners have admittedly filed appeals against those assessments under s. 246 of the IT Act. A copy of the appeal filed by the petitioner in O.P. No. 244 of 1994 has been filed as Ext. P6 in the writ petition. Though a copy of the appeal is not annexed in the other writ petition, it is admitted that such an appeal has been filed and that it is pending. In the circumstances it is only proper to direct that the said appeals should be disposed of expeditiously with appropriate directions regarding the recovery proceedings.

The only other question which requires consideration is regarding the recovery of the amounts demanded pursuant to the assessment while the appeals are pending. I leave it to the petitioners to move the appropriate authorities either for stay or for not treating them as in default pending the appeals, taking into account the very serious contentions which the petitioners have raised in the original petition as also the allegations made by them besides the ground stated in the appeals. I am sure the authorities concerned will deal with the matter in accordance with law and in proper exercise of the discretion as and when any such motion is made for stay pending the appeals.

The original petitions are dismissed leaving open the various questions raised for consideration in the appeals filed by the petitioners and subject to the above observations.

(1995) 126 Taxation 255 (Ker.)

IN THE HIGH COURT OF KERALA

(Before Hon'ble Mr. Justice K.S. Paripoornan & Hon'ble Mr. Justice K.P. Balanarayana Marar)

OP Nos. 1253 & 1531 of 1985

Commissioner of Agricultural Income-tax

vs.

Elembilery Estate, Cardamom Plantations

For the Appellant	:	**V.C. James**
For the Respondent	:	**None**
Decided on	:	22.2.1993

REFERENCE — Assessment completed as unregistered firm on the ground minor admitted to benefits of partnership without consent of guardian — Assessee curing the defect by a subsequent declaration of guardian — Registration allowed by Dy. CIT (A) — Upheld by Tribunal — Held, whether guardian to sign the deed when minor admitted to partnership or not — A pure question of law — Tribunal directed to refer the question of law.

Kerala Agricultural Income-tax Act, 1950 — Section 60(3).

FACTS

The respondent assessee was originally assessed as a registered firm. During the accounting period for the A.Y. 1975-76, there was a change in the constitution of the firm. One of the partners died. The firm was reconstituted. In the place of the dead partner, his minor son was admitted to the benefits of the partnership. The firm applied for registration. The assessing authority found that the minor was not represented by the guardian in the instrument of partnership. He held that the partnership deed was not valid in law. He declined to grant registration to the firm. For the same reason, he refused the renewal of registration for the A.Y. 1976-77. In appeal, the Dy. CIT(A) found that the guardian of the minor had by a subsequent declaration made it clear that the minor had been admitted to the benefit of the partnership, the partnership deed stood cured and so the firm was entitled to registration. The Tribunal upheld the decision of the Dy. CIT (A).

DECISION

The question as to whether in a case where the minor is admitted to the benefit of the partnership the guardian should have signed in the deed or expressed assent otherwise as representing the minor is a matter on which the Courts have expressed different views. The Hon'ble Court was of the view that a question of law arises out of the common order rendered by the Agricultural I.T.A.T. dated 21.11.1983. The Hon'ble Court, therefore,

directed the Kerala Agricultural I.T.A.T. to refer the two questions of law formulated hereinabove.

Cases referred to :

1. *Addl. CIT vs. Uttam Kumar Promod Kumar* (1974) 97 ITR 730 (All)
2. *Addl. CIT vs. Uttam Kumar Promod Kumar* (1978) 115 ITR 796 (All)
3. *Brij Rattan Lal Bhoop Kishore vs. CIT* (1982) Taxation 67(1) 4 (All); (1982) 136 ITR 722 (All)
4. *CIT vs. Associate Industrial Distributors* (1982) 138 ITR 304 (Cal)
5. *Safari Wines vs. CIT* (1988) Taxation 90(3) 82 (AP); (1988) 169 ITR 695 (AP)

Full text of the Judgment is given below :

JUDGMENT

(K.S. Paripoornan, J.)

These are connected cases. The Commr. of Agrl. IT is the petitioner in both the original petitions. The common assessee is the respondent in both the cases. The Commr. of Agrl. IT, representing the Revenue in these two original petitions, filed under s. 60(3) of the Agrl. IT Act, has prayed for a direction to the Agrl. ITAT, Kozhikode Bench to refer the following questions of law, formulated in paragraph 7 of the O.Ps. for the decision of this Court. This was necessitated, since the Agrl. ITAT, by a common order dt. 3rd April, 1984, of the years 1975-76 and 1976-77, declined to refer the questions of law for the decision of this Court:

"(i) Whether, on the facts and in the circumstances of the case, was the Tribunal right in directing to allow registration of the firm when the partnership deed was defective ?

(ii) Whether, on the facts and in the circumstances of the case, was the Tribunal right in holding that the defect in the partnership deed can be rectified by a subsequent declaration from the guardian of the minor and, therefore, the registration of the firm can be granted?"

The respondent/assessee was originally assessed as a registered firm. During the accounting period for the asst. yr. 1975-76, there was a change in the constitution of the firm. One of the partners died. The firm was reconstituted. In the place of the dead partner, his minor son was admitted to the benefit of the partnership. The firm applied for registration. The assessing authority found that the minor was not represented by the guardian in the instrument of partnership. He held that the partnership deed was not valid in law. He declined to grant registration to the firm. For the same reason, he refused the renewal of registration for the asst. yr. 1976-77. In appeal, the Dy. CIT(A), Kozhikode found that the guardian of the minor,

who was admitted to the benefit of partnership, had by a subsequent declaration made it clear that the minor had been admitted to the benefit of the partnership with the consent and knowledge of the guardian. He held that the defect in the partnership deed stood cured and so the firm is entitled to registration. The Revenue took up the matter in appeal before the Agrl. ITAT, Kozhikode. The Tribunal upheld the decision of the Dy. CIT(A). For the reason, renewal was granted for the subsequent year. In declining registration to the firm, the assessing authority relied on the decision of the Allahabad High Court in *Addl. CIT vs. Uttam Kumar Promod Kumar* (1974) 97 ITR 730 (All). The Tribunal distinguished the said decision and held that since the guardian had consented or agreed for the admission of the minor to the benefit of the partnership, the defect, if any, if cured and the firm is entitled to registration. According to the Tribunal, the fact that the assessing authority did not question the genuineness of the firm is a cogent factor. The initial defect, if any, in the non-junction of the guardian stood cured by subsequent consent. The Tribunal referred to the decision of the Allahabad High Court in *Brij Rattan Lal Bhoop Kishore vs. CIT* (1982) 136 ITR 722 (All) and held that the firm should have been given an opportunity before refusing registration and in that perspective when such an opportunity was given the guardian has assented the admission of the minor to the benefit of the partnership and since the Dy. CIT was satisfied that the defect or infirmity has been rectified or cured, the Dy. CIT was justified in granting registration. It is from this common order, for both the years - 1975-76 and 1976-77 dt. 21st Nov., 1983, the Revenue had filed applications (RA Nos. 6 and 7 of 1984) for referring certain questions of law for the decision of this Court, which was declined by the Tribunal, by a common order dt. 3rd April, 1984. It is in pursuance thereto, the above two original petitions are filed in this Court.

We heard counsel. The decision of the Allahabad High Court relied on by the assessing authority - *Uttam Kumar Promod Kumar's* case (supra) was approved by a Full Bench of the said Court in *Addl. CIT vs. Uttam Kumar Promod Kumar* (1978) 115 ITR 796 (All) (FB). The Calcutta High Court had taken a different view in *CIT vs. Associate Industrial Distributors* (1982) 138 ITR 304 (Cal). In *Safar Wines vs. CIT* (1988) 169 ITR 695 (AP), the Andhra Pradesh High Court has followed the Calcutta High Court's view. The question as to whether in a case where the minor is admitted to the benefit of the partnership the guardian should have signed in the deed or expressed assent otherwise as representing the minor is a matter on which the Court has expressed different views. We are of the view that a question of law arises out of the common order rendered by the Agrl. ITAT, dt. 21st Nov., 1983.

We, therefore, direct the Kerala Agrl. ITAT, Addl. Bench, Kozhikode to refer the two questions of law, formulated hereinabove, for the decision of this Court, for both the years 1975-76 and 1976-77.

The original petitions are allowed.

The Tribunal shall comply with order within three months from the date of receipt of a copy of this judgment. The Registrar shall send a copy of this judgment forthwith to the Agrl. ITAT, Addl. Bench, Kozhikode for compliance.

(1995) 126 Taxation 258 (Mad.)

IN THE HIGH COURT OF MADRAS

(Before Hon'ble Chief Justice Mr. K.A. Swami & Hon'ble Mr. Justice Somasundaram)

Writ Appeal Nos. 215 and 216 of 1994

Shyam Investments

vs.

Appropriate Authority

For the Appellant	:	**P.S. Raman and P.J. George**
For the Respondent	:	**N.V. Balasubramaniam**
Decided on	:	18.7.1994

ACQUISITION OF PROPERTY BY CENTRAL GOVT. — Govt. acquiring property — Order of purchase made — Before giving possession order challenged in writ petition — Stay made absolute — Subsequently delivered possession to Appropriate Authority and payment of Rs. 16 lakhs made to vendors — Assessee claiming directions contained in the case of *C.B. Gautam* applicable — Pre-emptive order made by Appropriate Authority quashed — Matter remitted to consider in accordance with law in the light of principles enunciated in *C.B. Gautam's* case.

Income-tax Act, 1961 — Section 269-UD.

FACTS

The immovable property involved in the proceeding consists of land and building situate at Madras. The petitioner firm agreed to purchase the same and paid a sum of Rs. 25,000/- by way of advance by cheque. Pursuant to the agreement, permission was sought for from the appropriate authority which chose to make pre-emptive purchase of the property. It is the validity of that order, which was challenged in writ petition. The learned Single Judge rejected it and stay was made absolute. Immediately within a week after the order of pre-emptive purchase was passed by the appropriate authority, the intending purchaser filed writ petition challenging the validity of the order directing him to purchase. The delivery of possession by the vendors to the appropriate authority and payment of a sum of Rs. 16 lakhs by the appropriate authority to the vendors took place pursuant to the orders passed in the writ petition.

DECISION

The order of pre-emptive purchase dated 9.12.1986 passed by the 1st respondent is quashed. The matter is remitted to the appropriate authority with a direction to consider the permission sought for by the intending purchaser and the owner in accordance with law and in the light of the principle enunciated in *C.B. Gautam's* case.

Cases referred to :

1. *C.B. Gautam vs. UOI* (1993) 199 ITR 530 (SC)
2. *Appropriate Authority vs. Mass Traders (P) Ltd.* (1993) 116 Taxation 156 (Kar.); (1993) 202 ITR 741 (Kar.)
3. *K.K. Anandan Ammal vs. UOI* (Writ Petition No. 10963 of 1987 dt. 7.4.1994)

Full text of the Judgment is given below :

JUDGMENT

(K.A. Swami, C.J.)

W.A. No. 215 of 1994:

W.A. No. 215 of 1994 is preferred against the order dated 5.1.1994 passed by the learned Single Judge in Writ Petition No. 14089 of 1986. The learned Single Judge has held that the clarification contained in the judgment of the Supreme Court in *C.B. Gautam vs. Union of India* (1993) 199 ITR 530 would make inapplicable the principles laid down in the said decision, therefore, the writ petition is liable to be dismissed. Accordingly, it has been dismissed. Hence, the petitioner therein has come up in appeal.

Facts necessary for the purpose of determining as to whether the view taken by the learned Single Judge is correct, are as follows : - The immovable property involved in the proceeding consists of land and building situate at 23, Padmavathiar Road, Royapettah, Madras. It consists of land measuring 3 grounds and 529 square feet and a building with a built-up area of 3,000 square feet. The petitioner-firm agreed to purchase the same under an agreement dated 24.10.1986 for a total consideration of Rs. 16,25,000 and paid a sum of Rs. 25,000 by way of advance by Cheque No. 662603 dated 24.10.1986 drawn on Indian Overseas Bank, Mylapore, Madras 4. There are other conditions contained in the agreement, which are not necessary for our purpose. Pursuant to the agreement, permission was sought for from the appropriate authority, but by the order under section 269UD(1) of the Income tax Act, 1961 ('the Act') dated 9.12.1986, it chose to make pre-emptive purchase of the property. It is the validity of that order, which was challenged in Writ Petition No. 14089 of 1986. As already pointed out, the learned Single Judge has rejected it. Writ Petition No. 14089 of 1986 was filed on 22.12.1986. There was an interim order passed on 23.12.1986 restraining the respondents from dispossessing the respondents

2 and 3, who are the vendors. This interim order was again modified on 23.1.1987 and it was directed as follows :

"After hearing the counsel on both sides, the limited stay originally granted is modified and the stay is made absolute in the following terms :

1. Stay of further proceedings pursuant to the impugned order is AA/MDS/10(51/12/86-87 dated 9.12.1986.

2. The respondents will not be obliged to pay any amount towards the purchase consideration to the transferor during the pendency of the writ proceedings and the transferor will not be allowed to take any place of limitation at any stage for the non-payment of the consideration in terms of the provisions of sections 269UG and 269UH of the Income-tax Act, 1961.

3. The transferor and the transferee are restrained from making any change in the nature and character of the property or from dealing with or from disposing of or in any way encumbering the property in question, during the pendency of this writ proceedings."

Thereafter, there was another W.M.P. filed by the vendors seeking a direction to the purchaser or the appropriate authority to pay a sum of Rs. 16,00,000. That application was dismissed by the order dated 29.6.1987. There was an appeal preferred against the order dated 29.6.1987 in Writ Appeal No. 1637 of 1987. A Division Bench by the judgment dated 15.10.1987 held as follows :

"Appeal admitted.

Having regard to the facts of the case, it appears to us that the order of stay made absolute by the learned single Judge needs to be modified. The appellants, on the averments made in this appeal, entered into an agreement of sale of the property in question, as they had to repay large amounts to the Punjab and Sind Bank, Mount Road, Madras. They had borrowed monies from the Bank and had created a mortgage by deposit of title deeds in respect of the property in question. Now it is obvious that the controversy between the intending purchaser and the Central Government cannot be permitted to adversely affect the vendors. The vendors are ready and willing to sell this property to whoever of the two is found entitled to purchase. At the same time the interest of the vendors need be safeguarded and it is necessary to prevent any further increase in their liability which they owe to the Punjab and Sind Bank. The agreement of sale is for a sum of Rs. 16,25,000. Out of that, the intending purchaser had paid a sum of Rs. 25,000 as advance. The balance of Rs. 16,00,000 is to be received by the vendors on execution of the sale deed. That sale deed, however, cannot be executed by them in spite of their willingness to do so because the

Central Government is now claiming a statutory right to purchase the property in question. It would, therefore, be fair and just to direct the Central Government to pay a sum of Rs. 16,00,000 on behalf of the appellants to the Punjab and Sind Bank, Mount Road, Madras-2. Mrs. Nalini Chidambaram appearing for the department wants this order to be restricted to the facts of this case. She is justified in saying so because we are making this order having regard to the fact that the appellants' liability to Punjab and Sind Bank is growing every day for no fault of theirs. The Central Government shall forward to the appellants a xerox copy of the receipt issued to them by the Punjab and Sind Bank after the payment is made to the bank on their account. The payment will be within two weeks from today. We also make it clear *that in case the original petitioner succeeds in his petition, the petitioner will be liable to pay the amount of Rs. 16,00,000 to the Central Government. Accordingly, the appeal stands disposed of. There will be no order as to costs.*" [Emphasis supplied]

Thus, from what is stated above, it was clear that immediately within a week after the order of pre-emptive purchase was passed by the appropriate authority, the intending purchaser filed Writ Petition No. 14089 of 1986 before this Court on 22.12.1986 challenging the validity of the order directing him to purchase. The delivery of possession by the vendors to the appropriate authority and payment of a sum of Rs. 16 lakhs by the appropriate authority and payment of a sum of Rs. 16 lakhs by the appropriate authority to the venders have taken place pursuant to the orders passed in the writ petition. As on the date when the writ petition was filed, except for passing the order to make a pre-emptive purchase no step had been taken pursuant to it. Neither the vendor, nor the purchaser had voluntarily agreed for handing over possession of the property in question to the appropriate authority. Of course, the vendors had sought for a direction to pay them the consideration amount. These facts are not in dispute. It is in the background of these facts that we have to determine whether the principles laid down in *C.B. Gautam's* case (supra) would be applicable to the case or else whether the case falls within the clarification contained in that decision. The clarification contained in *C.B. Gautam's* case (supra) is as follows :

"We may clarify that, as far as completed transactions are concerned, namely, where, after the order for compulsory purchase under section 269UD of the Income-tax Act was made and possession has been taken over, compensation was paid to the owner of the property and accepted without protest, we see no reason to upset those transactions and, hence, nothing we have said in the judgment will invalidate such purchases. The same will be the possession where public auctions have been held of the properties concerned and they are purchased by third parties. In those cases also, nothing which we have stated in this judgment will invalidate the purchases." (p. 562)

It is contended by Mr. N.V. Balasubramanian, the learned junior standing counsel for Income-tax Department, that as on the date the writ petition came up for hearing, the vendors had delivered the possession of the immovable property in question and had also received the consideration amount from the appropriate authority on their own accord by obtaining a direction from the Court. Therefore, the case falls within the aforesaid clarification as the possession had been taken over by the appropriate authority and compensation had been paid.

On the contrary, it is contended by the learned counsel for the appellant that the intending purchaser has immediately challenged the order directing pre-emptive purchase within a week from the date of the order and the rest of the events, viz., delivery of possession by the vendors to the appropriate authority and payment of the balance of consideration amount by the appropriate authority to the vendors, have all taken place, pursuant to the direction issued by this Court that in the absence of such a direction in the light of the interim order of stay passed at the instance of the writ petitioner it was not at all possible to obtain possession from the vendors and to pay the balance of consideration amount of Rs. 16 lakhs to them by the appropriate authority. The events that have taken place pursuant to the orders of the Court should not be construed so as to affect the interest of the writ petitioner. In support of this plea, the learned counsel has also placed reliance on a decision of a Division Bench of Karnataka High Court in *Appropriate Authority vs. Mass Traders (P.) Ltd.* (1993) 202 ITR 741. The learned junior standing counsel for Income-tax placed reliance on a Division Bench decision of this Court in *K.K. Anandan Ammal vs. Union of India* [Writ Petition No. 10963 of 1987, dated 7.4.1994].

On a careful consideration of the clarification contained in *C.B. Gautam's* case (supra) and also on going through the entire decision in that case, we are of the view that the said clarification cannot be made applicable to a case in which the order of pre-emptive purchase is challenged immediately after the order is passed and before the delivery of possession by the vendors and receiving of consideration amount from the appropriate authority. In addition to this, in this case, delivery of possession and receiving of the balance of consideration amount are subject to the result of the writ petition as had been ordered in the judgment passed in Writ Appeal No. 1637 of 1987, dated 15.10.1987. This is clear from the last portion of the order extracted earlier which has been italicised by us. There is also another principle that the orders of the Court passed pending final adjudication shall not be interpreted to cause prejudice to any of the parties as the same would always be subject to the final adjudication unless otherwise specifically ordered. Therefore, when the delivery of possession and payment of consideration amount have taken place, pursuant to the order of Court and subject to the result of the writ petition, such an event cannot be interpreted as an event which had taken place voluntarily so as to bring the case within

the clarification contained in *C.B. Gautam's* case (supra). Therefore, we are of the view that in the facts and circumstances of the case, it is not possible to apply the clarification. In addition to this, it may also be noticed that in that very clarification itself, it has been stated by the Supreme Court that the compensation amount is paid to the owners of the property and accepted without protest. Here, the amount has been accepted subject to the result of the writ petition under the order of the Court. Therefore, looked at from any point of view, it is not possible to bring the case within the purview of the clarification contained in the judgment in *C.B. Gautam's* case (supra).

In the case of *Mass Traders (P.) Ltd.* (supra), a Division Bench of the Karnataka High Court has taken a view that the clarification does not cover the case pending on the date the judgment of the Supreme Court in *C.B. Gautam's* case (supra) was delivered. On the facts and circumstances of case, as stated above, We consider that we need not go to that extent in this cases and hold that the clarification will not apply to cases which were pending on the date on which *C.B. Gautam's* case (supra), was decided. In addition to this, it may also be pointed out that though the Supreme Court has dismissed the S.L.P. filed against the judgment in *Mass Traders (P.) Ltd.'s* case (supra), it has nevertheless left open all other points decided therein.

The decision of a Division Bench of this Court in *K.K. Anandam Ammal's* case (supra) stands on the facts stated in that case. That was a case in which the writ petition was filed not only after the delivery of possession by the owners of the property pursuant to the order of pre-emptive purchase, but also subsequent to the sale of that property in public auction and further sale of the same by the auction purchaser. Under those circumstances, it was held that the clarification contained in *C.B. Gautam's* case (supra) was applicable and as such, the rule laid down in *C.B. Gautam's* case (supra) was not applicable and as such, the decision of the appropriate authority was not liable to be interfered with.

For the reasons stated above, the writ appeal is entitled to succeed.

The next question for consideration is as to what direction should be issued in the case. As a result of allowing the writ appeal and setting aside the order of the learned single Judge and quashing the pre-emptive purchase order the matter has to be remitted to the appropriate authority. As the position stands, the property in question is in the possession of the appropriate authority and the owner has received the full consideration amount of Rs. 16,25,000 out of which Rs. 25,000 is paid by the intending purchaser as an advance. Consequently, the owner of the property will not be any more interested. It is the intending purchaser who has to pursue the remedy. In the event the appropriate authority holds in favour of the intending purchaser, there must be an assurance that he would be immediately able to pay the consideration amount. Secondly, in the event the appropriate

authority decides to make pre-emptive purchase of the property, the appropriate authority will not be required to pay any further amount to the vendors who have already received the consideration amount. It has also to pay a sum of Rs. 25,000 to the intending purchaser which amount he has paid as advance towards the agreed consideration amount of Rs. 16,25,000. In the event, the appropriate authority decides in favour of the intending purchaser and thereby permits the sale, the intending purchaser is required to pay the interest on the consideration amount of Rs. 16 lakhs from February 1988 till the date of the order at the rate of 12 per cent per annum.

Accordingly, the writ appeal is allowed. The order dated 5.1.1994 passed in Writ Petition No. 14089 of 1986 is set aside. The writ petition is allowed. The order of pre-emptive purchase dated 9.12.1986 passed by the 1st respondent is quashed. The matter is remitted to the appropriate authority with a direction to consider the permission sought for by the intending purchaser and the owner in accordance with law and in the light of the principle enunciated in *C.B. Gautam's* case (supra). The appellant shall furnish security by way of bank guarantee to the satisfaction of the appropriate authority for a sum of Rs. 16 lakhs within 4 weeks from today. In the event the appropriate authority decides to grant permission for sale in favour of the intending purchaser, the appropriate authority can encash the bank guarantee towards the recovery of the amount paid by it to the vendors. The intending purchaser shall also pay interest on the sum of Rs. 16 lakhs from February 1988 till the date of order granting permission for sale at the rate of 12 per cent within a period of 3 weeks from the date of such order. In the event the appropriate authority directs pre-emptive purchase of the property, the bank guarantee shall stand cancelled and the appropriate authority shall pay Rs. 25,000 to the intending purchaser-petitioner. There shall be no order as to costs.

W.A. No. 216 of 1994:

It is not necessary to consider this case in greater detail, because the judgment delivered by us in Writ Appeal No. 215 of 1994 will cover this appeal also and along with that appeal, this writ appeal has been posted and both the appeals are heard together. Accordingly, following the said judgment, this writ appeal is allowed. The order dated 5.1.1994 passed by the learned Single Judge in Writ Petition No. 234 of 1987 is set aside. The writ petition is allowed in the following terms:

(i) The order dated 9.12.1986 passed by the 1st respondent-appropriate authority under section 269UD(1) is hereby quashed.

(ii) The case is remitted to the appropriate authority for fresh consideration in the light of the principles laid down in *C.B. Gautam's* case (supra).

(iii) The intending purchaser, viz., the appellant shall furnish security

by way of bank guarantee to the satisfaction of the appropriate authority for a sum of Rs. 14,25,000 within four weeks from today. In the event, the appropriate authority decides to grant permission for sale as per the agreement of sale in question, the bank guarantee can be encashed by the appropriate authority. In addition to that, the appellant shall pay interest to the appropriate authority on the sum of Rs. 14,25,000 from 9.2.1987 till the date of the order at the rate of 12 per cent per annum in 3 weeks from the date of the order. In the event the appropriate authority directs pre-emptive purchase of the property, the bank guarantee shall stand cancelled. However, there shall be no order as to costs.

(1995) 126 Taxation 265 (P&H)

IN THE HIGH COURT OF PUNJAB & HARYANA

(Before Hon'ble Mr. Justice A.P. Chowdhri & Hon'ble Mr. Justice P.K. Palli)

ITRC No. 158 of 1994

Commissioner of Income-tax

vs.

Haryana State Cooperative Supply & Marketing Federation Ltd.

For the Appellant	:	**R.P. Sawhney**
For the Respondent	:	**M.L. Garg**
Decided on	:	16.2.1994

REFERENCE — Assessee a cooperative marketing society — Assessee claiming income derived from marketing of agricultural produce from its members to be exempt — Tribunal holding the same to be exempt — Reference by revenue refused — Held, in view of latest Supreme Court judgment upholding the judgment of another court, question of law did arise — Tribunal directed to refer the case.

Income-tax Act, 1961 — Section 256(2).

FACTS

There is a three tier system. The lowest in the rung are the primary cooperative societies with farmers as their members. The next tier is the district cooperative societies, of which the primary cooperative societies are members and the apex body is the Haryana State Cooperative Supply & Marketing Federation Ltd. The question involved is the interpretation of section 80P(2)(a)(iii) of the Act.

DECISION

The contention of the revenue is that it is open to the Department to initiate

proceedings for rectification in view of the later decision of the Supreme Court. We do not accept this contention. Once the matter has been decided by the High Court, it is not possible for the Department to carry out rectification on the solitary ground that in a later decision, the Supreme Court has impliedly overruled that decision. The Hon'ble Court was, therefore, of the view that the petition deserves to be allowed. The Tribunal was, accordingly, directed to refer the question set out in the beginning of this order u/s 256(2) of the Act to this Court according to law.

Cases referred to :

1. *Assam Cooperative Apex Marketing Society Ltd. vs. Addl. CIT* (1977) Taxation LR 737 (Gau); (1977) 110 ITR 33 (Gau)
2. *Assam Cooperative Apex Marketing Society Ltd. vs. Addl. CIT* (1993) 201 ITR 338 (SC)
3. *CIT vs. Haryana State Cooperative Supply & Marketing Federation Ltd.*; (1990) Taxation 96(3) 117; (1990) 182 ITR 53 (P&H)

Full text of the Judgment is given below :

JUDGMENT

The Tribunal, Chandigarh Bench, decided ITA No. 1176/Chd/ 1987; asst. yr. 1981-82 in the case of *ITO vs. Haryana State Co-operative Supply & Marketing Federation Ltd.*, Chandigarh, by order dt. 3rd Sept., 1992. The CIT, Patiala, petitioner herein, applied for a reference under s. 256(1) of the IT Act, 1961 (hereinafter referred to as 'the Act') to the Tribunal, requesting it to draw up a statement of the case and to refer the same for the opinion of this Court. The question formulated was in the following terms:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the order of the CIT(A) deleting the addition of Rs. 2,28,02,000 made on account of income from marketing of agricultural produce which was claimed to be exempt under s. 80P(2)(a)(iii) of the IT Act, 1961 ?"

The application was dismissed on the ground that no referable question of law in the opinion of the Tribunal arose from the above order of the Tribunal. In the present petition under s. 256(2) of the Act, the petitioner seeks a direction to the Tribunal to refer the aforesaid question for decision of this Court.

In response to notice of motion, Mr. M.L. Garg has appeared on behalf of the respondent.

We have heard Mr. R.P. Sawhney for the petitioner and Mr. M.L. Garg for the respondent.

There is a three tier system. The lowest in the rung are the primary cooperative societies with farmers as their members. The next tier is the

district cooperative societies, of which the primary cooperative societies are members and the apex body is the Haryana State Cooperative Supply & Marketing Federation Ltd. The question involved is the interpretation of section 80P(2)(a)(iii) of the Act. In *CIT vs. Haryana State Co-operative Supply & Marketing Federation Ltd.* (1990) 182 ITR 53 (P&H) a Division Bench of this Court held that the apex co-operative society was entitled to exemption in respect of marketing of agricultural produce received, purchased or acquired from its members. In coming to this conclusion, the learned Judges distinguished the judgment of Gauhati High Court in *Assam Co-operative Apex Marketing Society Ltd. vs. Addl. CIT* (1977) 110 ITR 33 (Gau.), in which it was held that the apex co-operative society was not entitled to the exemption under the aforesaid provision of the Act. In a later decision, their Lordships of the Supreme Court in *Assam Co-operative Apex Marketing Society Ltd. vs. Addl. CIT* (1993) 201 ITR 338 (SC) affirmed the aforesaid decision of Gauhati High Court in 1977 110 ITR 33 (Gau).

The contention of Mr. Sawhney, therefore, is that a substantial question of law arises. The contention of Mr. Garg, on the other hand, is that it is open to the Department to initiate proceedings for rectification in view of the later decision of the Supreme Court. We do not accept this contention. Once the matter has been decided by the High Court, it is not possible for the Department to carry out rectification on the solitary ground that in a later decision, the Supreme Court has impliedly overruled that decision. We are, therefore, of the view that the petition deserves to be allowed. We, accordingly, direct the Tribunal to refer the question set out in the beginning of this order u/s 256(2) of the Act to this Court according to law.

(1995) 126 Taxation 267 (Guj.)

IN THE HIGH COURT OF GUJARAT

(Before Hon'ble Justice Mr. M.B. Shah & Hon'ble Justice Mr. J.M. Panchal)

I.T. Reference Nos. 900 to 903 of 1979

Commissioner of Income-tax

vs.

Barkate Saifiyah Society

For the Appellant	:	**B.J. Shelat**
For the Respondent	:	**D.A. Mehta**
Decided on	:	3-11-1993

EXEMPTION FROM TAX — Assessee a trust claiming exemption u/s 11 — Object of the trust property both charitable and religious activities — ITO refusing exemption holding provisions of Section

13(1)(b) applicable in cases of charitable and religious trusts — AAC holding provisions of Section 13(1)(b) not applicable — Tribunal dismissing appeal of revenue — Held, Section 13(1)(b) applies only to trusts purely for charitable purposes — Assessee being charitable as well as religious trust entitled to exemption u/s 11.

Income-tax Act, 1961 — Sections 11 & 13(1)(b).

FACTS

The A.Ys. involved are 1971-72 to 1974-75. The ITO arrived at the conclusion that the assessee was not entitled to get the benefit u/s 11 of the Act as it was hit by the provisions of section 13(1)(b) of the Act. The ITO further held that since the objects of the trust were both charitable and religious, the provisions of Section 13(1)(b) are applicable in cases of such trusts. The AAC, however, arrived at the conclusion that the trust was charitable and religious and if the objects of the trust are independent and the trustees are given powers to spend the trust funds towards any of the objects of the trust, the nature of the trust would be decided by taking into consideration the objects of the trust. He, therefore, held that in the present case the trustees were empowered to spend the trust funds on religious activities which were independent of other activities. Therefore, the provisions of Section 13(1)(b) were not applicable. The revenue filed appeal before the Tribunal. The Tribunal dismissed the appeal of the revenue. Being aggrieved, the assessee sought reference before the High Court.

DECISION

The Hon'ble Court held that it may be noted that definition of phrase 'charitable purposes' is inclusive and it covers wider field than the field covered by the words 'religious purpose'. Further in some cases even on religious activity by a a particular sect would be a charitable activity; for some, supply of fodder to animals and cattle is a religious object while to others it may be charitable purpose. Hence what are purely religious purpose and what religious will be charitable purposes must be decided according to Hindu notions and Hindu law. If a reference is made to the religious purpose as defined in section 2(15) and to the provisions of sec. 13, it is clear that it carves out an exception to section 11 or 12 by providing that in those cases which are covered by clauses (a), (b), (c) and (d), provisions of section 11 or 12 shall not operate. Broadly speaking it is divided into three categories and exception is carved out in case of profit of religious trusts, charitable trusts and charitable or religious trusts if the conditions in clauses (a), (b), (c) and (d) are satisfied. Clauses (c) and (d) carve out an exception in the case of a trust for charitable or religious purpose or a charitable or religious institution. It provides certain cases in which any income thereof enures, used or applied directly or indirectly for the benefit

of any person referred to in sub-section (3). In clauses (c) and (d) the Legislature wanted to include a trust for charitable and religious purposes, it is specifically provided by using the phrase 'trust for charitable and religious purpose. In clauses (c) & (d) the Legislature has used the phrase 'a trust for charitable purposes or religious institutions'. It does not deal with a trust for religious purpose'. Hence, if a charitable trust is created only for the benefit of any particular religious community or caste then provisions of section 11 could not be applicable but in case of a trust or institution for religious purpose wherein certain activities could be termed as charitable activities for the benefit of any particular religious community or caste, clause (b) would not be applicable. The Tribunal was, therefore, right in holding that section 13(1)(b) applies only to trusts which are only for charitable purpose and the assessee trust was charitable as well as religious in nature and thus the assessee was entitled to exemption u/s 11.

Cases referred to :

1. *Ramchandra vs. Shree Mahadeoji* AIR (1970) SC 458
2. *Fazlul Rabbi vs. State of West Bengal* AIR 1965 SC 1722
3. *Addl. CIT vs. A.A. Bibijiwala Trust* (1975) 100 ITR 516 (Guj.)

Full text of Judgment is given below :

JUDGMENT

(M.B. Shah, J.)

For the assessment years 1971-72 to 1974-75, the ITO arrived at the conclusion that the assessee Shri Bharkate Saifiyash Society, Rajkot, was not entitled to get benefit under section 11 of the Income-tax Act, 1961 ('the Act') as it was hit by the provisions of section 13(1)(b) of the Act. For this purpose, he has referred to the objects of the trust which are as under :

(i) To help the poor and the needy.

(ii) Medical relief.

(iii) Provision for education.

(iv) To carry out the religious activities.

He observed that the provisions of section 13(1)(b) are not applicable in the cases of charitable and religious trusts. However, he held that the trustees have not carried out any religious activities and it was not provided in the trust deed that a specified portion of the income or corpus would be spent on any of the objects. The trustees are carrying on activities of charitable nature only and that simply by labelling the trust to be charitable and religious, it does not become so.

The AAC by his order dated 28-11-1977 set aside the said part of the order. He arrived at the conclusion that the trust was charitable and religious

and if the objects of the trust are independent and the trustees are given powers to spend the trust funds towards any of the object of the trust within the framework of the trust deed, the nature of the trust would be decided by taking into consideration the objects of the trust. He further held that in the present case the trustees were empowered to spend the trust funds on religious activities which were independent of other activities. Therefore, the provisions of section 13(1)(b) were not applicable.

Against that order, the revenue preferred appeal before the Tribunal. The Tribunal arrived at the conclusion that section 11 exempts income from the property held by the charitable or religious trust while section 13(1)(b) takes away such exemption in case of trust for charitable purpose only, in case it is for the benefit of any particular religious community or caste; the assessee is no doubt a trust created for a charitable purpose only, it would come within the mischief of section 13(1)(b); however, if a trust is for charitable purposes and also for religious purposes and if the element of religious purpose is comparatively smaller or even if the element of religious purpose is comparatively smaller or even insignificant, it cannot be said that the trust is a trust for charitable purposes. The Tribunal, therefore, dismissed the appeal filed by the revenue by its order dated 4-8-1979.

Feeling aggrieved by the said order, the revenue filed reference application and the Tribunal referred the following questions for our opinion under section 256(1) of the Act:

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in holding that the provisions of section 13(1)(b) applied only to trusts which were purely for charitable purposes and since the assessee-trust was found to be charitable as well as religious in nature the assessee was entitled to exemption under section 11 of the Income-tax Act, 1961?"

2. Whether, the assessee-trust which was mainly for charitable purposes and as it was created for the benefit of a particular religious community, it was not entitled to exemption under section 11 by virtue of section 13(1)(b) of the Income-tax Act, 1961?"

For determining the controversy, first we would refer to the relevant part of the provision of section 11 which reads as under :

"Income from property held for charitable or religious purposes — (1) Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income —

(a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated

or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of twenty-five per cent of the income from such property;

(b) Income derived from property held under trust in part only for such purposes, the trust having been created before the commencement of this Act, to the extent to which such income is applied to such purposes in India, and, where any such income is finally set apart for application to such purposes in India, to the extent to which the income so set apart is not in excess of twenty-five per cent of income from such property."

The phrase 'religious purpose' includes relief of the poor, education, medical relief, and the advancement.

However, the phrase Charitable purposes' is defined under section 2(15) of the Act which reads as under :

"(15) 'charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility not involving the carrying on of any activity for profit,"

It is to be noted that definition of the phrase 'charitable purposes' is inclusive and it covers wider field than the field covered by the words 'religious purpose'. Further, in some cases, even a religious activity by a particular sect would be a charitable activity; for some, supply of fodder to animals and cattle is a religious object, while to others it may be a charitable purpose, according to Hindu religious activity. Similarly, Khairat under the Mohmedan Law would be considered to be a religious activity. The said activities may be for a charitable purpose to some. Hence, in many cases, both the purposes may be overlapping. The purposes may have both the elements, charity as well as religious.

While dealing with what is 'religious' or 'charitable purpose' it is observed by the Supreme Court in the case of *Ramchandra vs. Shree Mahadeoji* AIR 1970 SC 458, that there is no line of demarcation in Hindu system betwen religion and charity. Indeed, charity is regarded as part of religion. While discussing this aspect, the Supreme Court has further observed as under:

"Hindu piety found expression in gifts to ideals to religious institutions and for all purposes considered meritorious in the Hindu social and religious system. Therefore, although courts in India have for a long adopted the technical meaning of charitable trusts and charitable purposes which the Courts in England have placed upon the form, 'charity in the Statute of Elizabeth, and, therefore, all purposes which according to English law are charitable will be charitable under Hindu law, the Hindu concept of charity is so comprehensive that there are other purposes in addition which are recognised as charitable purposes. Hence what

are purely religious purposes and what religious purposes will be charitable purposes must be decided according to Hindu notions and Hindu law.

17. As observed by Mukerjee in Hindu Law and Religious and Charitable Trust, 2nd Edn., p. 11, there is no line of demarcation the Hindu system between religion and charity. Indeed, charity is regarded as part of religion, for gifts both for religious and charitable purposes are impelled by the desire to acquire religious merit. According to Pandit Prannath Saraswati, these fell under two heads, Ista and Purta. The former meant sacrifices, and sacrificial gifts and the latter meant charities. Among the Istha acts are Vedic sacrifices, gift to the priests at the time of such sacrifices and hospitability. Among the Purta acts are construction and maintenance of temples, tanks, wells, planting of groves, gifts of food, dharamshalas, places for drinking water, relief of the sick, and promotion of education and learning. (cf. Pandit Prannath Saraswati's Hindu Law of Endowments, 1897, pp. 26-27). Istha and Purta are in fact regarded as the common duties of the twice born class". (cf. Pandit Saraswati, p. 27).

In view of the aforesaid discussion, it can be said that a trust can be either for religious purposes or for charitable purposes or it can be for both, charitable and religious purposes.

Identical definition of phrase 'charitable purpose' was considered by the Supreme Court in the case of *Fazlul Rabbi vs. State of West Bengal* AIR 1965 SC 1722, in the context of the West Bengal Estates Acquisition Act, 1953. Under section 2 (c) of the Act, 'charitable purpose', was defined to mean as including the relief of poor, medical relief or the advancement of education or of any other object of general public utility. The definition of 'religious purpose' under section 2(n) is as under :

"2(n) 'religious purpose' means a purpose connected with religious worship, teaching or service or any performance of religious rites" (p. 1724) Under section 6 of the said Act, the exemption is given to corporations and institutions established exclusively for a religious or a charitable purpose or both. The Court observed that the word 'exclusively' limits the exemption to trusts, endowments or other legal obligations which come solely within charitable or religious purposes. With regard to definition of 'charitable purposes', the Court observed that it follows, though not quite, the well-know definition of charity given by Lord Macnaghton in *Commissioners for Special Purposes of Income-tax vs. Pemsel* 1891 AC 531 and held as under :

"No doubt the popular meaning of the words 'charity' and 'charitable' does not coincide with their legal meaning; and no doubt it is easy enough to collect from the books a few decisions which seem to push the doctrine of the Court to the extreme and to present a contrast between the two meanings in an aspect almost ludicrous. But still it is difficult to fix the

point of divergence, and no one as yet has succeeded in defining the popular meaning of the word 'charity'. The learned counsel for the Crown did not attempt the task. Even the paraphrase of the Master of the Rolls is not quite satisfactory". (p. 583)

It is further held as under :

"I think they would be surprised to learn that the substantial cause of their missionary zal was an intention to assist the poverty of heathen tribes. How far then, it may be asked, does the poplar meaning of the word 'charity' correspond with its legal meaning? Charity in its legal sense comprises four principal divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

Thereafter, the Court held that for satisfying the test for charitable purpose, there must always be some element of public benefit.

Hence words 'trust for charitable purpose' would include even trust for advancement of religion. At this stage, we would note that the definition of charitable purpose under the Income-tax Act goes much further than the definition of charity to be derived from the English cases because it specifically includes medical relief and embraces all objects of general public utility subject only to the condition imposed by the restrictive words not involving carrying on of any activity for profit. While dealing with section 11, a Division Bench of this Court in the case of *Addl. CIT vs. AA. Bibijiwala Trust* (1975) 100 ITR 516, has observed as under :

"...Similarly, in the case before us also, the property is settled upon wakf, that is, for purposes which are considered to be religious, pious or charitable according to the notions of members of the Dawoodi Bohra community and further the income in the corpus of these properties settled upon trust must be used for Dawat purposes, that is for the benefit of the Dawoodi Bohra community. Though the words of clauses 6, 7 and 8 are very wide in terms, in fact that apparently wide discretion of the Mullaji Saheb is bound down by the two factors, namely, that this is a wakf, a dedication by a Musalman, are pious, religious or charitable, and, secondly, it must be used for Dawat purposes, that is, for purposes which go to benefit the Dawoodi Bohra community. With these two limitations operating on him, even the apparently wide discretion conferred upon the Mullaji Saheb as Dai-ul-Mutlak for the time being confined within the four corners of these two overriding factors and in view of these two overriding factors it must be held that the properties in question settled by the two deeds of January 12, 1937, were settled upon trust for charitable or religious objects and were, therefore, entitled to exemption under section 11(1)(a) of the Act of 1961. We must make it clear that the real controversy between the

parties is regarding exemption under section 11(1)(a) of the Act of 1961 and not whether the trusts are wholly religious or wholly charitable. Even if the trusts are partly religious and partly charitable, so long as no part of the income or corpus can be utilised for a purpose which is not either charitable or religious, there is no doubt that the exemption under Section 11 (1)(a) will be available to the assessee. In the instant case, we find that, in spite of the apparently wide language of the clauses of the deed of trust, in fact reading the trust deed as a whole, it transpires, particularly in the light of the decision of the Bombay High Court in apparently wide discretion has to be exercised within the four corners of the wakf and for Dawat purposes. What are dawat purposes, have been described by Martan J., at page 1102, in *Advocate-General of Bombay vs. Yusufalli* and, in our opinion, it is only within the four corners of Dawat purposes as recognised by the Dawoodi Bohra community that the Mullaji Saheb can use the corpus of the income of this fund" (p. 523).

From the aforesaid decision it can be held that if the trusts are partly religious and partly charitable, so long as no part of the income or corpus can be utilised for a purpose which is not either charitable or religious, exemption under section 11(1)(a) will be applicable to the assessee.

Keeping in mind the aforesaid discussion, how we will refer to relevant portion of section 13 which carves out an exception to the aforesaid provisions. It reads as under :

"Section 11 not to apply in certain cases —

(1) Nothing contained in section 11 or section 12 shall operate so as to exclude from the total income of the previous year of the person in the receipt thereof — (a) any part of the income from the property held under a trust for private religious purposes which does not enure for the benefit of the public ;

(b) in the case of trust for charitable purpose or a charitable institution created or established after the commencement of this Act, any income thereof if the trust or institution is created or established for the benefit of any particular religious community or caste;

(c) in the case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof —

(i) if such trust or institution has been created or established after the commencement of this Act and under the terms of the trust or the rules governing the institution, any part of such income enures, or

(ii) if any part of such income or any property of the trust or the institution (whenever created or established) is during the previous year used or applied, directly or indirectly for the benefit of any person referred to in sub-section (3):

(d) in the case of a trust for charitable or religious purposes or a charitable or religious institution, any period during the previous year—

(i) any funds of the trust or institution are invested or deposited after the 28th day of February, 1983 otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11; or

(ii) any funds of the trust or institution invested or deposited before the 1st day of March, 1983 otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11 continue to remain so invested or deposited after the 30th day of November, 1983; or

(iii) any shares in a company (not being a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) or a corporation established by or under a Central, State or Provincial Act) are held by the trust or institution after the 30th day of November 1983."

By reading the aforesaid section, it is clear that it carves out an exception to section 11 or 12 by providing that in those cases which are covered by clauses (a), (b), (c) and (d), provisions of section 11 or 12 shall not operate. Broadly speaking, it is divided into three categories and exception is carved out in case of private religious trust, charitable trust and charitable or religious trust if the conditions mentioned in clauses (a), (b), (c) and (d) are satisfied. Firstly, any part of the income from the property held under a trust for private religious purposes which does not enure for the benefit of the public is not to be excluded as provided under section 11. That means, benefit of section 11 would not be given to a trust which is a private religious trust which does not enure for the benefit of the public (as per sub-clause(5)). Secondly, any income of a trust for charitable institution is created or established after the commencement of Income-tax Act. In each case the authority is required to find out whether the trust for charitable purposes is established for the benefit of a particular religious community or caste. If it is so established, then the provisions of section 11 would not be applicable. Thirdly, clauses (c) and (d) carve out an exception in case of a trust for charitable or religious purposes or a charitable or religious institution. It provides certain cases in which any income thereof enures, used or applied, directly or indirectly, for the benefit of any person referred to in sub-section (3). In clauses (c) and (d) the Legislature wanted to include a trust for charitable and religious purposes, it is specifically provided by using the phrase 'trust for charitable or religious purposes'. In clauses (c) and (d), the Legislature has used the phrase trust for charitable purposes or charitable institution. It does not deal with a trust for religious purposes. It only deals with a trust for charitable purposes or charitable purposes or charitable institutions which are established for giving relief to the poor or medical relief or for education of any particular religious community or caste. Clauses (c) and (d) would be applicable to a trust which is either for

charitable purposes or religious purposes or partly charitable purposes and partly religious. Hence it can be stated that if a charitable trust is established only for the benefit of any particular religious community or caste, then provisions of section 11 would not be applicable. But in the case of a trust or an institution for religious purposes wherein certain activities can be termed as charitable activities for the benefit of any particular religious community or caste, clause (b) would not be applicable.

Mr. Shelat, the learned counsel for the revenue, vehemently submitted that by giving this interpretation to clause (b) of section 13(1), the said clause (b) can be made nugatory by only using the words in trust deed that the trust was established for religious and charitable purpose. He, therefore, submitted that the authority is required to determine the predeminant purpose of the trust and if predominant purpose is charitable purpose and it is difficult to accept the said contention mainly because it is nowhere provided in the section that in each case the authority shall find out predominant purpose of the trust. Further, as stated earlier, in three different clauses, namely, (a), (b) and (c) of sub-section (1) of section 13, the Legislature has used different phrases. Clause (a), as stated earlier, deals with a trust for private religious purposes or a charitable or religious institution. From this different phraseology used by the Legislature in clauses (a), (b) and (c), it can be inferred that the Legislature intended to cover only trust for charitable purposes under clause (b). That means, if a trust is composite, that is, for religious and charitable purposes, then it would not be covered It is also apparent that if the trust is only for religious purposes, clause (b) would not be applicable.

In view of the aforesaid discussion, in our view, the Tribunal has rightly held that section 13(1)(b) applies only to trusts which were purely for charitable purposes and the assessee-trust was charitable as well as religious in nature and the assessee was entitled to exemption under section 11. Hence, question No.1 is answered in the affirmative in favour of the assessee and against the revenue.

With regard to question No.2 once it is held that section 13(1)(b) would be applicable in a case where the trust is exclusively for charitable institution are not required to be decided for arriving at a conclusion, whether section 13(1)(b) is applicable or not. Hence question No. 2 is answered in favour of the assessee and against the revenue.

In the result, the reference stands disposed of accordingly with no order as to costs.

(1995) 126 Taxation 277 (Pat.)

IN THE HIGH COURT OF PATNA

(Before Hon'ble Mr. Justice Gopi Chand Bharuka &
Hon'ble Mr. Justice Aftab Alam)

Taxation Case No. 40 of 1975

Commissioner of Income-tax

vs.

Girish Kumar Kothari

For the Appellant : **K.K. Vidyarathi**
For the Respondent : **Rameshwar Prasad**
Decided on : 21-7-1993

PENALTY FOR CONCEALMENT — Assessee filing original return for A.Y. 1953-54 — Assessment completed — Assessment reopened u/s 148 — Assessee returning same income — ITO making certain additions — Penalty for concealment levied — Penalty imposed considering the law as applicable on the date of filing of revised return — Held, penalty to be imposed u/s 28(1)(c) of 1922 Act and not u/s 271(1)(c) *Explanation* — Tribunal justified in cancelling the penalty — No evidence on record to establish beyond doubt that the amount added represented assessee's income for A.Y. 1953-54.

Income-tax Act, 1922— Section 28(1)(c)

Income-tax Act, 1961 — Section 271(1)(c).

FACTS

The proceedings relate to the A.Y. 1953-54. The assessee had filed its original return disclosing the total income at Rs. 24,353/-. Later on pursuant to search and seizure made in the premises of the assessee on 16-12-1966, reassessment proceedings were initiated and a notice u/s 148 of the IT Act, 1961 was issued on 4-1-1969. The assessee filed its return showing the same income as returned earlier. In the assessment proceedings, an addition of Rs. 23,907/- was sustained upto Tribunal as income from undisclosed sources based on unexplained cash credits. Because of those additions, penalty proceedings u/s 271(1)(c) were initiated and Rs. 23,907/- was imposed as penalty for concealment of income by the IAC. On appeal, the Tribunal set aside the said order of penalty.

DECISION

The Hon'ble court observed that the moot question was whether in the present case the penal provisions as contained under the old Act will apply or those constrained under the new Act will apply. The ultimate question as posed above, has been answered to a good extent by the Supreme Court

in the case of *CIT vs. Onkar Saran & Sons* wherein their Lordships have affirmed the view taken by the majority of the High Courts holding that even in a case where a return filed in response to a notice u/s 148 involved an element of concealment, the law applicable for imposition of penalty will be the law as in force at the time of filing of the original return for the A.Y. in question and not the law as stands on the date on which returns in response to notice u/s 148 are filed. The Hon'ble court held that for these reasons, the Tribunal was justified in law in deleting the penalty in question. The question was thus answered in favour of the assessee.

Cases referred to :

1. *CIT vs. Onkar Saran & Sons* (1992) 195 ITR 1 (SC)
2. *Ballabhdas Mathuradas Lakhanani & Ors. vs. Municipal Committee* AIR 1970 SC 1002
3. *CIT vs. Parmanand Advani* (1979) 119 ITR 464 (Pat.)
4. *CIT vs. Anwar Ali* (1970) 76 ITR 696 (SC)

Full text of the Judgment is given below :

JUDGMENT

(G.C. Bharuka, J.)

In the present reference application we have been called upon to answer the following question :

> "Whether, in the facts and in the circumstances of the case, the Tribunal was justified in law in deleting the penalty of Rs. 23,907 imposed under s. 271(1)(c) of the IT Act, 1961 ?"

The proceedings relate to the asst. yr. 1953-54. The assessee had filed its original return disclosing the total income at Rs. 24,353. Later on pursuant to search and seizure made in the premises of the assessee on 16th Dec., 1966, reassessment proceedings were initiated and a notice under s. 148 of the IT Act, 1961 (hereinafter the new Act only) was issued on 4th Jan., 1969. The assessee filed its return showing the same income as returned earlier. In the assessment proceedings, an addition of Rs. 23,907 was sustained upto Tribunal as income from undisclosed sources based on unexplained cash credits. Because of those additions, penalty procedings under s. 271(1)(c) were initiated and Rs. 23,907 was imposed as penalty for concealment of income by the IAC. On appeal, the Tribunal set aside the said order of penalty by taking the view that merely because the assessee's explanation was rejected or because sufficient evidence had not been produced to prove the claim of the assessee that the amount in question did not represent the income of this year, it could not be said that the Department had discharged its onus of proving that the amount in question represented the assessee's concealed income. The Tribunal also held that no cogent material has been brought on the record by the Department to

establish beyond doubt that the amount in question did represent the assessee's income which was assessable in the asst. yr. 1953-54.

Sri K.K. Vidhyarathi, learned counsel for the Department, has submitted that since the impugned penalty proceeding has been initiated in 1969, therefore, keeping in view the *Expln.* to s. 271(1)(c) r/w s. 297(2)(g) of the new Act, the onus was on the assessee to rebut the presumption of concealment in relation to the additions. In support of his submission, he has placed reliance on the Supreme Court decision in the case of *CIT vs. Mussadilal Ram Bharose* (1987) 165 ITR 14 (SC). By reference to the case of *CIT vs. Parmanand Advani* (1979) 119 ITR 464 (Pat.), it was further submitted that the *Expln.* to s. 271(1)(c) is merely procedural, therefore, even if the substantive part is not held to be applicable, at least the *Explanation* will apply since the procedural provisions, unless indicated, are necessarily retrospective in their application.

Mr. Rameshwar Prasad No. II, learned counsel appearing for the assessee, strenuously submitted that in view of the recent judgment of the Supreme Court in the case of *CIT vs. Onkar Saran & Sons* (1992) 195 ITR 1 (SC), the question has to be necessarily answered against the Department because now the apex Court conclusively has resolved the controversy by holding that even in a case where a return filed in response to a notice under s. 148 of the Act involved an element of concealment, the law applicable would be the law as it stood at the time when the original return was filed for the assessment year in question and not the law as it stood on the date on which the return was filed in response to the notice under s. 148. In substance, his submission is that in view of the pronouncement of the Supreme Court, the case of the assessee has to be governed by the provisions contained in s. 28(1)(c) of the IT Act, 1922 (hereinafter in short the 'old Act' only) and not by these contained under s. 271(1)(c) of the new Act.

The provisions contained in s. 28(1)(c) of the old Act and ss. 271(1)(c) and 297(2)(g) of the new Act to the extent those are relevant for the present case may be quoted hereunder :

"Sec. 28(1)(c)(old Act) : *Penalty for concealment of income or improper distribution of profits* — (1) If the ITO, the AAC or the Tribunal, in the course of any proceedings under this Act, is satisfied that any person-

(a) ....

(b) ....

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he or it may direct that such person shall pay by way of penalty....
.....

and in the cases referred to in cls. (b) and (c) in addition to any tax payable by him, a sum not exceeding one and a half time the amount

of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income :

...."

"Sec. 271. *Failure to furnish returns, comply with notices, concealment of income, etc.* — (i) If the ITO or the AAC in the course of any proceedings under this Act is satisfied that any person —

(a) ....

(b) ....

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty —

....

(iii) In the cases referred to in cl. (c), in addition to any tax payable by him, a sum which shall not be less than but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished.

Explanation — Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this *Explanation* referred to as the correct income) as assessed under s. 143 or s. 144 or s. 147 reduced by the expenditure incurred *bona fide* by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of cl. (c) of this sub-section."

"Sec. 297. *Repeals and savings.* — (1) The Indian IT Act, 1922 (11 of 1922) is hereby repealed.

(2) Notwithstanding the repeal of the Indian IT Act, 1922 (11 of 1922) (hereinafter referred to as the repealed Act):

....

....

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st March, 1962 or any earlier year, which is completed on or after the 1st April 1962 may be initiated and any such penalty may be imposed under this Act."

Now proceeding to examine the submissions made at the bar, in view of the Supreme Court judgment in the case of *CIT vs. Anwar Ali* (1970) 76

ITR 696 (SC), it has to be taken as the settled law that if in the facts of the present case s. 28(1)(c) of the old Act is taken to be applicable then the view taken by the Tribunal has to be held as correct. But if it is not so, then *CIT vs. Mussadilal Ram Bharose* (supra) will govern the answer to the question. Therefore, the moot question is, whether in the present case the penal provisions as contained under the old Act will apply or those contained under the new Act will apply. Mr. Rameshwar Prasad No. II is partially right in submitting that the ultimate question as posed above, has been answered to a good extent by the Supreme Court in the case of *CIT vs. Onkar Saran & Sons* (supra) wherein their Lordships have affirmed the view taken by the majority of the High Courts holding that even in a case where a return filed in response to a notice under s. 148 involved an element of concealment, the law applicable for imposition of penalty will be the law as in force at the time of filing of the original return for the assessment year in question and not the law as stands on the date on which returns in response to notice under s. 148 are filed. No doubt, in this case the Supreme Court was dealing only in relation to the measure of penalty but the law declared has to be taken as applicable to the penal provision taken as a whole. Apart from all other reasons, in my opinion, keeping in view the settled principles of interpretation of statutes, no second view is possible. Neither anything convincing could be submitted at the Bar nor I could find for myself to take the view that in case like the present one, though the measure of penalty has to be governed by the provision of the old Act but the law relating to onus should be culled out from the new Act. In my opinion the *Explanation* added to s. 271(1)(c) of the new Act is an integral part of this section and the provisions contained under the said section can either be made applicable as a whole to a given set of facts or not at all.

So far as the decision of this Court in the case of *CIT vs. Parmanand Advani* (supra) is concerned, it cannot be said to have been a bearing on the question involved in this case because in that case the penalty proceedings related to asst. yr. 1963-64 and the original return as well as that pursuant to notice under s. 148 were both filed under the provisions of the new Act. Therefore, for the concealment of income the provisions of s. 271(1)(c) were clearly attracted. The controversy was as to whether the *Explanation* of the said section which was added w.e.f. 1st April, 1964 was at all applicable since the original return was filed prior to 1st April, 1964 though the second return pursuant to reassessment proceeding had been filed subsequent to the said date. Therefore, in the said case, admittedly s. 271(1)(c) of the new Act was applicable. Apart from this distinguishing feature which is quite material in nature, in view of broad language used by the Supreme Court in the case of *CIT vs. Onkar Saran* (supra) the judgment of this Court in the aforesaid case cannot be said to hold the field in the facts like the present one.

So far as the submission of Mr. Vidhyarathi based on s. 297(2)(g) of the new Act is concerned, in my opinion even if it be accepted that it has relevance to the point at issue and has not been taken note of by the apex Court, still it is not permissible for this Court to traverse beyond the dictum as laid down in *CIT vs. Onkar Saran* (supra) in view of Art. 141 of the Constitution of India because what binds is the law delared and not the reasons therefor. In *Ballabhdas Mathuradas Lakhanani & ors. vs. Municipal Committee* AIR 1970 SC 1002 (Para 4) it has been held that the High Courts cannot ignore the decision of the Supreme Court because they think that "relevant provisions were not brought to the notice of the Court". Apart from this, s. 297(2)(g) has its relevance in relation to the provisions contained in s. 274 which is essentially procedural in nature.

For the reasons noticed above, in my opinion, the Tribunal was justified in law in deleting the penalty in question. The question is thus answered in favour of the assessee. There will be no order as to costs.

Aftab Alam, J. - I agree.

(1995) 126 Taxation 282 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Justice Y.R. Meena &

Hon'ble Mr. Justice V.K. Singhal)

DBIT Reference No. 99 of 1983

M/s Dhandia Jewellers

vs.

Commissioner of Income-tax

For the Appellant	:	**T.C. Jain**
For the Respondent	:	**G.S. Bafna**
Decided on	:	10-1-1995

REJECTION OF ACCOUNTS — Tribunal holding enough material on record to enhance sales and application of G.P. rate at 21% — Tribunal also sustaining addition from undisclosed sources on ground of sales grouped as adhat sales — Held, In regard to estimate of sales and application of rate only question of fact — No reference — As regards the estimate of income on account of sale on adhat basis, already covered by the addition to the estimated sale and gross profit.

Income-tax Act, 1961 — Section 145(1).

FACTS & DECISION

Initially the assessment was completed on total sales of Rs. 8,66,179/-. The gross profit of Rs. 1,37,235/- accepted which worked out to a G.P. rate of 16.35%. The CIT set aside the assessment u/s 263. Admittedly,

the closing stock was not verifiable and the provisions of section 145(1) were applicable. The ITO, therefore, completed the assessment by estimating the sales and by applying a G.P. rate of 25%. The assessee took up the matter before the Tribunal. The Tribunal held that on the basis of facts it was clear that the exports sales during the year was three times the local sales and as such it was obvious that the assessee earned more profit on exports sales than on local sales. In view of these facts the estimate of sales was justified and the G.P. rate was also confirmed. Another addition of Rs. 20,314/- was sustained on the ground that the assessee had shown sales on adhat basis which were not genuine. Being aggrieved, the assessee sought reference to the High Court. The Hon'ble Court held that as far as the estimate on sales and application of G.P. rate was concerned, there was enough material on record to justify the same. As regards the second addition, there was no justification for the addition of Rs. 23,714/- on account of sale on adhat basis from undisclosed sources as the addition has already been made by enhancing the gross sale and gross profit. The reference was partly allowed in favour of the revenue and partly in favour of the assessee.

Cases referred to :

1. *CIT vs. Tyaryamal Balchand,* (1987) Taxation 87 (3) 424 (Raj.); 165 ITR 453
2. *CIT vs. Jawanmal Gemaji Gandhi* (1985) 151 ITR 353

Full text of the Judgment is given below :

JUDGMENT

(Y.R. Meena, J.)

Earlier, in the application under sec. 256(2) of the Income-tax Act, 1961, the assessee required Income-tax Appellate Tribunal to draw the statement of case for the assessment year 1971-72 and to refer the questions of law to this court. On the request of the assessee the Tribunal was directed to refer the following questions of law to this court -

1. "Whether on the facts and in the circumstances of the case, there was material on record to justify the enhancing of the estimated sales of the assessee to Rs.9,10,000/- and in applying gross profit rate of 21% ?
2. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in sustaining the addition of Rs. 20,714/- as the income of the assessee from undisclosed sources or the said amount should have been added to the trading account of the assessee or telescoped with the trading of the assessee or telescoped with the trading account of the assessee keeping in view the facts that intangible additions have been made."

In the assessment return for the assessment year 1971-72 the assessee has disclosed total sales of Rs. 8,66,179/- and has shown gross profit of Rs. 1,37,235/-. The gross-profit rate shown by the assessee was 16.35% which was accepted by the ITO, but thereafter the order of the ITO was cancelled by the Commissioner under section 263 of the Income-tax Act and the Commissioner directed him to make a fresh assessment after taking into consideration the provisions of sec. 273(c) of the Income-tax Act and the Commissioner directed him to make a fresh assessment after taking into consideration the provisions of Sec. 273(c) of the Income-tax Act. In the fresh assessment the ITO found that the assessee firm's opening and closing sheets are not verifiable as inventories of opening and closing stocks have not been filed on the ground that they have not been prepared. Even the complete list of purchases of cut-stones party-wise has not been supplied on the ground that it is not possible to give the names of the parties from whom finished goods have been locally purchased as their number is very large. When the closing stock was not verifiable he attracted the provisions of Sec. 145(1) of the Income-tax Act and issued notice to the assessee to show as to why gross profit rate should not be taken as 25% which was applied in this case at the time of original assessment. The assessee has filed the details of exports and local sales on the basis of which he tried to justify the Gross Profit rate at 16.5%. The relevant details are as under-

Cut Stones		Assessment Year 1970-71	Assessment Year 1971-72
(i)	Exports	2,04,942	7.33,599
(ii)	Local sales	30,111	25,104
(iii)	Branch transfer	30,299	—
(iv)	Rough stones sales	7,38,918	1,04,252
		10,04,270	8,62,956
	Gross Profit	16,15,802	1,37,285
•	GP Rate	16.5%	16.0%

From these figures the ITO found that this year the export sales have gone three times than the previous year. It is also found that in the preceding year of 1970-71 though the profit was estimated at 25%, but that was reduced to 20%. Before the ITO it was also argued that because there was competition in the export in the year under consideration, the profit margin was very low on export sales. It was also argued that out of export-sale of the total export-sale of Rs. 7,33,599/-, sale of Rs. 6,10,207/- was made on sale basis and not on consignment basis and on the sale basis the profit is also comparatively low, and the money is not immediately realised on consignment sale. Even no separate accounts for local and export sales

have been maintained. It was also found in the assessment year 1969-70 that the assessee himself has shown gross profit rate at 19.3%, and finally it was accepted at 20% and for 1970-71 the rate of 18.5% has been accepted finally.

Learned counsel for the assessee, Mr. Jain has submitted that even though there is no dispute that the proviso to Section 145 is not attracted, but even then no arbitrary G.P. rate can be applied by the assessing authority and when there is no material to estimate the G.P. rate at 25%, no addition can be made. It is true that no arbitrary rate of G.P. can be applied, but in such circumstances what can be the rate, that has to be seen from the material on record. The facts are not in dispute that in 1960-70 the G.P. rate was applied at 19.3% which was finally accepted at 20% and in 1970-71 it was 18%. This year the GP rate has been estimated at 25% and the facts are also not in dispute that this year the export sales are three times and that has gone from Rs. 2,04,942/- in the year 1970-71 to Rs. 7,33,599/- in the assessment year under consideration. It is obvious that he earned more profits on export sales than the local sales. In view of these facts available on record, the estimate of G.P. rate at 25% in the year under consideration cannot be said to be perverse. No interference is called for in G.P. rate. The Tribunal has reduced the sale to Rs. 9,10,000. In the facts and circumstances of the case no interference is called for regarding the sale estimated by the Tribunal.

The second question referred by the Tribunal regarding the addition of Rs. 20,714/- on account of bogus sales shown on Arhat basis to 13 parties. The assessee has shown the sale of goods on Arhat basis to 13 parties amounting to Rs. 29,168/-. He was asked to prove the genuineness of the sale. He produced 4 parties. Thus, the amount was reduced from Rs. 23,581/- to Rs. 20,714/-. Learned counsel for the assessee submits that even assuming that the sale to 11 parties are not genuine and it is taken to be the sale shown from undisclosed sources, but on that basis no further addition can be made while the addition has already been made to the tune of Rs. 53,865/- on the basis of enhancement in sale proceeds and enhancement of GP rate. He placed reliance on the decision in the case of *CIT vs. Tyaryamal Balchand* 165 ITR 453 wherein at page 458 after referring the case of *CIT vs. Jawanmal Gemaji Gandhi* (1985) 151 ITR 353, the court observed as under -

> "It was held that secret profits or undisclosed income of an assessee earned in an earlier assessment year can constitute a fund, though concealed, from which the assessee may draw subsequently. In the instant case, the assessee acquired the gold during the latter half of the assessment year and it could be that the undisclosed income earned in that very year constituted a fund from which the asset was acquired".

Considering the view taken by this court in the case of *Tyaryamal Balchand*

(supra) we find no justification for the addition of Rs. 20,714/- on account of sale on Arhat basis from undisclosed sources as the addition has already been made by enhancing the gross sale and gross profit.

Consequently, we answer the question No. 1 in favour of the department and against the assessee while we answer question No. 2 in favour of the assessee and against the department. No order as to costs.

(1995) 126 Taxation 286 (SC)

IN THE SUPREME COURT OF INDIA

(Before Hon'ble Mr. Justice B.P. Jeevan Reddy,
Hon'ble Mr. Justice Suhas C. Sen
& Hon'ble Mr. Justice K.S. Paripoornan)

Civil Appeal No. 3360 of 1984

Smt. Nita Taneja

vs.

Assistant Controller of Estate Duty & Anr.

Decided on : 7-9-1994

RECTIFICATION — Estate Duty assessment completed adding only 1/2 share of the husband in the taxable estate — Assistant Controller holding other 1/2 belonging to the wife — Subsequently order rectified holding entire estate to be added in the taxable estate of the deceased — Order challenged — Held, order not rectifiable being a debatable point.

Estate Duty Act, 1953 — Section 61.

FACTS

One B.P. Taneja died on 29-3-1970. His wife, the appellant herein, filed a return as an accountable person stating that only half the estate held by the deceased passed to her inasmuch as she was entitled to the other half. The return filed by her was accepted by the authority with certain modifications. Later, on 26-10-1977, the Assistant Controller of Estate Duty issued a notice u/s 61 of the E.D. Act proposing to rectify the assessment order. According to this notice, on the death of the deceased, the entire estate passed and not merely half of it. The appellant filed objections contending, inter alia, that the mistake, if any, was not a mistake apparent from the record warranting invocation of the power of rectification u/s 61 of the E.D. Act. Assistant Controller overruled the objections by his order dated 8-9-1977. In this order, the Assistant Controller did not specifically deal with the objections raised by the appellant that since there was no mistake apparent from the record, power of rectification could not be exercised. The High Court dealt with other points raised by the appellant but refused to deal with the submission

that power of rectification was not available on the ground that the said issue was not dealt with by the Assistant Controller.

DECISION

According to the School of Hindu Law governing the parties herein the appellant was entitled to a share if a partition had taken place during the lifetime of the deceased. Whether she was entitled to demand a partition, we are not sure. In such a situation, if the order of assessment accepted that she had half a share and that only the deceased's half interest passed on his death, it cannot be said that the order suffers from an error apparent from the record which is amenable to rectification u/s 61 of the E.D. Act. At best, it was a debatable question. On this ground alone and without expressing any opinion on the facts of the case, we allow this appeal and set aside the order of the Assistant Controller of E.D. dated 8-9-1977.

Full text of the Judgment is given below :

JUDGMENT

Heard learned counsel for the parties.

This appeal is preferred against the judgment of the Patna High Court dismissing the writ petition filed by the appellant. The matter arises under the Estate Duty Act.

One B P. Taneja died on 29th March, 1970. His wife, the appellant herein, filed a return as an accountable person stating that only half the estate held by the deceased passed to her inasmuch as she was entitled to the other half. The return filed by her was accepted by the authority with certain modifications. Later, on 26th Oct., 1977, the Asstt. Controller issued a notice under s. 61 of the ED Act proposing to rectify the assessment order. According to this notice, on the death of the deceased, the entire estate passed and not merely half of it. The appellant filed objections contending, *inter alia,* that the mistake, if any, was not a mistake apparent from the record warranting invocation of the power of rectification under s. 61 of the ED Act. Asstt. Controller overruled the objections by his order dt. 8th Sept., 1977. In this order, the Asstt. Controller did not specifically deal with the objections raised by the appellant that since there was no mistake apparent from the record, power of rectification could not be exercised. The appellant questioned the order of the Asstt. Controller by way of a writ petition filed in the High Court. The High Court dealt with other points raised by the appellant but refused to deal with the submission that power of rectification was not available (inasmuch as there was no error from the record) on the ground that the said issue was not dealt with by the Asstt. Controller. The said order is questioned in this appeal.

From the order of the Asstt. Controller, it does not appear that a personal hearing was given to the appellant. Be that as it may, the fact remains that he did nof deal with the objection aforesaid which was expressly raised

by the appellant in her memo of objections/explanation. The very same objection was repeated in the High Court. Though we cannot say that the High Court was not justified in the view it has taken on the said question, we are of the opinion, having regard to all the facts and circumstances of the case that it would be appropriate if we deal with the said question on merits. We have taken into consideration the meagre amount of tax involved, the fact that the matter relates to the estate of a person who died in 1970 and the further fact that the Act has since been repealed.

We are not satisfied that this was a case where power of rectification could have been invoked. According to the School of Hindu Law governing the parties herein, the appellant was entitled to a share if a partition had taken place during the lifetime of the deceased. Whether she was entitled to demand a partition, we are not sure. In such a situation, if the order of assessment accepted that she had half a share and that only the deceased's half interest passed on his death, it cannot be said that the order suffers from an error apparent from the record which is amenable to rectification under s. 61 of the ED Act. At best, it was a debatable question. On this ground alone and without expressing any opinion on the facts of the case, we allow this appeal and set aside the order of the Asstt. Controller dt 8th Sept., 1977. There will be no order as to costs.

(1995) 126 Taxation 288 (SC)

IN THE SUPREME COURT OF INDIA

(Before Hon'ble Mr. Justice Kuldip Singh &
Hon'ble Mr. Justice Ramaswamy)

Civil Appeal Nos. 3069 & 3070 (NCT) of 1981

East India Hotels Ltd. & Anr. etc. etc.

vs.

State of Jammu & Kashmir & Anr. etc. etc.

Decided on : 12-7-1994

CONSTITUTIONAL VALIDITY OF JAMMU & KASHMIR HOTEL (AMENITIES & SERVICES) TARIFF TAXATION ACT, 1980 — Assessee contending levy of tax on gross receipts and therefore tax on income falling under Entry 82, List I, Schedule VII o Constitution of India — High Court rejecting assessee's plea — Held tax leviable irrespective of the consideration whether hotel keeper earns any income or not — Levy of amenities and services provided by hotel keeper to its customers — Falls within the legislative competence of the State.

Constitution of India — Schedule VII, Entry 62, List II and Entry 82, List I.

FACTS

The main contention raised by the appellants before the High Court

was that the levy of tax on the gross receipts of the 'hotel keeper' and as such it is a tax on 'income' which could only be imposed by the Parliament under Entry 82, List I, Schedule VII, Constitution of India. The High Court referred to section 13 of the Act which authorised the 'hotel keeper' to charge the tax due from the customers. It further noticed that the taxing event under the Act is not the receipt of gross income by a 'hotel keeper' but is in fact the provision of amenities and services by him to his customers. The gross income of a 'hotel keeper' has been merely used as a measure to quantify the tax payable under the Act. Interpreting the relevant provisions of the Act, the High Court found that the tax is leviable irrespective of the consideration whether the 'hotel keeper' earns any income in the sense of the IT Act. All that is necessary is the occupancy of the hotel by the customers and their availing the amenities and services envisaged under the Act. On appreciation of all these factors the High Court came to the conclusion that the levy, being on amenities and services provided by the 'hotel keeper' to his customers it was not a tax on income and as such was within the legislative competence of the State legislature.

DECISION

By the Presidential Order, made under Article 370(1) called the Constitution (Application to Jammu & Kashmir) Order, 1954, the provisions of the Constitution of India were extended and made applicable to the State of Jammu & Kashmir with several exceptions and modifications. The words 'notwithstanding anything in clauses (2) and (3)' occurring in clause (1), and clauses 2, 3 and 4 of Article 246 were omitted. Article 248 and Entry 97 of List I, List II and List III (Concurrent List) of the VIIth Schedule were also omitted. Thus the Parliament was vested with the power to make laws in respect of Jammu & Kashmir with respect to the matters enumerated in Entries 1 to 96 of List I Schedule VII. The residuary power was retained by the State of Jammu & Kashmir. It is thus obvious that except the legislature relating to Entries 1 to 96 of List I the legislature of Jammu & Kashmir can legislate on every other matter. Section 5 of the Jammu & Kashmir Constitution reads as under :

> "*Extent of executive and legislative power of the State* — The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India."

The Jammu & Kashmir legislature has, therefore, the legislative competence to enact laws on any subject which comes within List II Schedule VII by virtue of the residuary power it has been given by the Presidential Order mentioned above. The Constitution Bench in *Express Hotels* case has held that the four legislations dealt with therein were under Entry 62, List II, Schedule VII, Constitution of India. On similar reasoning the Act would

also be a legislation under the same Entry, and as such within the competer of the Jammu & Kashmir legislature. We also agree with the reasoni and the conclusions reached by the High Court. There is no force in t contention that the Act is a legislation under Entry 82, List I, Sched VII, Constitution of India. We, therefore, see no ground to interfere w the Division Bench judgment of the High Court. The appeals/writ petitic are dismissed.

Case referred to :

Express Hotels Pvt. Ltd. vs. State of Gujarat & Anr. (1989) 2 SCR 8

Full text of the Judgment is given below :

JUDGMENT

(Kuldip Singh, J.)

The question for consideration is whether the Jammu & Kashmir St legislature has the legislative competence to enact the Jammu & Kashr Hotel (Amenities and Services) Tariff Taxation Act, 1980 (the Act). Division Bench of the Jammu & Kashmir High Court answered the questi in the affirmative. These appeals are against the judgment of the High Cou In the writ petitions under Art. 32 of the Constitution of India, the valid of the Act has been challenged on the same grounds as was done by t appellants before the High Court.

The preamble to the Act seeks to provide for the levy of tax on the amenit and services in a hotel in the State. Section 2 is the definition clause defines, *inter alia*, the expressions "amenities and services" and "hot occurring in cls. (c) and (j) respectively which are as follows :

> "(c) "Amenities and Services" includes lodging, boarding, massagi bathing, hair dressing, and beauty parlour facilities and providi entertainment and other facilities, whether charged/chargeable join or separately;
>
> (j) "Hotel" means any premises or part of premises including a h house-boat, tent, guest house, rest house or a club occupied by resid or casual visitors with or without board, service and amenities consideration of a tariff and includes a restaurant excluding the porti used as a bar for service or supply of liquor as defined in Jammu Kashmir Excise Act, Svt. 1958, attached or annexed thereto."

Sec. 3 read with schedule annexed to the Act are the charging provisic which provide :

"Schedule

Rate of Tariff	Rate of Tax
A. Resident Visitors	
1. Up to Rupees 100 a day	5%

2. Rs. 101 to Rs. 200 a day	8%
3. Rs. 201 to Rs. 300 a day	12%
4. Rs. 301 and above a day	15%
B. Casual (Non-resident) visitors — Full amount of tariff	8%"

Sec. 13 of the Act which provides for collection of taxes by the assessee is as under :

> "13. *Collection of tax by the assessee*—(1) A registered hotel keeper is authorised to charge the tax due on tariff under the provisions of this Act.
>
> (2) Notwithstanding anything contained in sub-s. (1)
>
> (a) if any person other than a registered hotel keeper collects any amount by way of tax leviable under this Act, or
>
> (b) if any registered hotel keeper collects tax in excess of the amount chargeable under this Act,
>
> such person or such registered hotel keeper, as the case may be, shall pay such sum to the Government within the period of thirty days from the expiry of each quarter and the provisions of sub-s. (1) of s. 12 and the provisions of this Act relating to recovery shall apply to the recovery of such sum."

The remaining sections of the Act refer to the returns to be filed by every "hotel keeper" and "person" liable to pay tax under the Act, the assessment and collection of tax, the imposition of penalty, the payment of tax and penalty, appeals, revisions etc. etc.

The main contention raised by the appellants before the High Court was that the levy of tax is on the gross receipts of the 'hotel keeper' and as such it is a tax on "income" which could only be imposed by the Parliament under Entry 82 List I Schedule VII Constitution of India. The High Court referred to s. 13 of the Act, which authorised the 'hotel keeper' to charge the tax due from the customers. It further noticed that the taxing event under the Act is not the receipt of gross income by a 'hotel keeper' but is in fact the provision of amenities and services by him to his customers. The gross income of a 'hotel keeper' has been merely used as a measure to quantify the tax payable under the Act. Interpreting the relevant provisions of the Act, the High Court found that the tax is leviable irrespective of the consideration whether the 'hotel keeper' earns any income in the sense of the IT Act. All that is necessary is the occupancy of the hotel by the customers and their availing the amenities and services envisaged under the Act. On appreciation of all these factors the High Court came to the conclusion that the levy, being on amenities and services provided by the 'hotel keeper' to his customers it was not a tax on income and as such was within the legislative competence of the State legislature.

It is not necessary for us to go into the merits of the controversy raise before the High Court because the matter is no longer *res integra*. Th constitutional validity of The Gujarat Tax on Luxuries (Hotels and Lodgin Houses) Act, 1977, Tamil Nadu Tax on Luxuries in Hotels and Lodgin Houses Act, 1981, The Karnataka Tax on Luxuries (Hotels and Lodgin Houses) Act, 1979 and The West Bengal Entertainments and Luxurie (Hotels and Restaurants) Tax Act, 1972 which are legislations similar t the Act, was challenged before this Court in *Express Hotels Pvt. Ltd. v State of Gujarat & Anr.* (1989) 2 SCR 893 on the ground that the impositic of tax on "luxury" was beyond the legislative competence of the Stat legislatures under Entry 62 List II of VIIth Schedule to the Constitution (India. This Court dismissed the writ petitions of the Hotel Owners and uphe the validity of the State legislations. All the four taxing statutes before th Court in *Express Hotels* case (supra) were analogous to the Act and th scheme of the legislations was substantially similar. The following contention *inter alia*, were raised before this Court in *Express Hotels* case (supr

> "(a) The Taxation Entry 62 of List II providing on "luxuries" conten plates, and takes within its sweep, a tax on goods and articles in the aspect and character as luxuries and does not include "services" ("activities". The levy on the services for lodging provided at the hotel is, therefore, beyond the scope of Entry 62 List II.
>
> (c) The real criterion distinguishing 'luxury' is the special attribute : quality of the commodity or the services, as the case may be, and n(the price-factor simpliciter. The essential distinguishing attribute is qualitative one. Distinction based purely on the quantitative differen(in the price is not a rational criterion to identify 'luxuries'. The impo based on the mere criterion of price which has no relation to the conce| of luxuries, is *ultra vires* the State power under Entry 62 List II.
>
> (d) The scheme of the Act in so far as it makes the price and not qualit the sole basis for identification of the subject of the tax, makes n distinction between the components of the services which include bo necessities and comforts, as distinguishable, from 'luxuries'. Levy c such subject-matter is bad."

M.N. Venkatachaliah, J. (as the Learned CJI then was) speaking for th Constitution Bench rejected the contentions on the following reasonin

> "The concept of a tax on 'luxuries' in Entry 62, List II cannot be limite merely to tax things tangible and corporeal in their aspect as 'luxuries It is true that while frugal or simple food and medicine may be classifie as necessities; articles such as jewellery, perfume, intoxicating-liquo tobacco, etc. could be called articles of luxury. But the legislative ent cannot be exhausted by these cases, illustrative of the concept. T entry encompasses all the manifestations or emanations, the notion 'luxuries' can fairly and reasonably be said to comprehend. The eleme

of extravagance or indulgence that differentiates 'luxury' from 'necessity' cannot be confined to goods and articles. There can be elements of extravagance or indulgence in the quality of services and activities ...We are presently concerned with the question whether the quality or standards of lodging accommodation in hotels can be called luxurious by contemporary standards by reason of the higher standards of charges payable for the accommodation. Legislature has chosen to identify the luxury by the statutory standards prescribed by it. According to the legislative assumption, price does become evidence of the special quality on the basis of which 'luxuries' could be distinguished and that some special quality is attributable to goods and services through the means of the price..Quality and price, in the legislative assessment, can be assumed to have a logical inter-relationship. This cannot be held to suffer from the vice of irrationality".

The provisions of the Act are similar to the legislations of the four States mentioned above and the scheme of the Act is also substantially the same. Therefore, for the reasons and the conclusions reached by the Constitution Bench of this Court in *Express Hotels* case (supra) the challenge to the validity of the Act on the ground of legislative competence has to be rejected.

We may briefly notice the constitutional provisions under which the legislature of the State of Jammu & Kashmir has the competence to legislate the Act. Art. 370 of the Constitution of India, to the extent relevant, is as under :

"*Temporary provisions with respect to the State of Jammu & Kashmir*—

(1) Notwithstanding anything in this Constitution,—

(b) the power of Parliament to make laws for the said State shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions. and modifications as the President may by order specify".

By the Presidential Order, made under Art. 370(1) called the Constitution (Application to Jammu & Kashmir) Order, 1954, the provisions of the Constitution of India were extended and made applicable to the State of Jammu & Kashmir with several exceptions and modifications. The words

"notwithstanding anything in cls. (2) and (3)" occurring in cl. (1), and cls. 2, 3 and 4 of Art. 246 were omitted. Art. 248 and Entry 97 of List I, List II and List III (Concurrent List) of the VIIth Schedule were also omitted. Thus the Parliament was vested with the power to make laws in respect of Jammu & Kashmir with respect to the matters enumerated in Entries 1 to 96 of List I Schedule VII. The residuary power was retained by the State of Jammu and Kashmir. It is thus obvious that except the legislation relating to Entries 1 to 96 of List I the legislature of Jammu & Kashmir can legislate on every other matter. Sec. 5 of the Jammu & Kashmir Constitution reads as under :

> "*Extent of executive and legislative power of the State.*— The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India."

The Jammu & Kashmir legislature has, therefore, the legislative competence to enact laws on any subject which comes within List II Schedule VII by virtue of the residuary power it has been given by the Presidential Order mentioned above. The Constitution Bench in *Express Hotels* case has held that the four legislations dealt with therein were under Entry 62, List II, Schedule VII, Constitution of India. On similar reasoning the Act would also be a legislation under the same Entry, and as such within the competence of the Jammu & Kashmir legislature. We also agree with the reasoning and the conclusions reached by the High Court. There is no force in the contention that the Act is a legislation under Entry 82, List I, Schedule VII, Constitution of India. We, therefore, see no ground to interfere with the Division Bench judgment of the High Court. The appeals/writ petitions are dismissed. No costs.

(1995) 126 Taxation 294 (SC)

IN THE SUPREME COURT OF INDIA

(Before Hon'ble Mr. Justice S.C. Agrawal,
Hon'ble Mr. Justice Faizan Uddin
and Hon'ble Mrs. Justice Sujata V. Manohar)

Civil Appeal No. 9161 of 1994

State Bank of Bikaner & Jaipur
vs.
National Iron & Steel Rolling Corporation & Others

For the Appellant	:	**V.M. Tarkunde with Anil Kr. Sangal and K.K. Gagna**
For the Respondent	:	**V.R. Reddy with A.P. Dhamija, Sushil Kr. Jain and S. Attreya**
Decided on	:	14-12-1994

RECOVERY OF TAX — Properties of the dealer mortgaged to the bank — Demand of sales-tax raised — Bank filing suit for recovery of amount and Commercial Taxes Officer impleading himself in the suit claiming prior claim for recovery of sales-tax — Held, the Act creates first charge of sales-tax over the properties — First charge covers entire property including the interest of the mortgagee bank — Sales-tax has thus a prior charge.

Rajasthan Sales-tax Act, 1954 — Section 11AAAA

Transfer of Property Act, 1882 — Sections 58 & 100.

FACTS

The appellant bank had given cash credit facilities to the respondent on the security of its entire property including plant and machinery. There is also an agreement for the pledge of movables executed by the respondents in favour of the bank. The bank filed suit for recovery of Rs. 3,79,672/- with future interest payable. While the suit was pending, the Commercial Taxes Officer, Bharatpur got himself impleaded in the suit on the ground that he had a prior claim for the recovery of a sum of Rs. 1,19,122/- as sales-tax dues. The property was sold by auction and the entire sales proceeds were deposited with the Court. The Commercial Taxes Officer rests his case on the provisions of section 11AAAA of Rajasthan Sales-tax Act, 1954.

DECISION

Under this section the amount of sales-tax or any other sum due and payable by a dealer or any other person under the Rajasthan Sales-tax Act, 1954 is a first charge on the property of the dealer or of such person. Where a mortgage is created in respect of any property undoubtedly an interest in the property is carved out in favour of the mortgagee. This does not, however, mean that the property ceases to be the property of the mortgagor. The title to the property remains with the mortgagor. Therefore, when a statutory first charge is created on the property of the dealer, the property subjected to first charge is the entire property of the dealer. The interest of the mortgagee is not excluded for the first charge. The first charge, therefore, which is created u/s 11AAAA of Rajasthan Sales-tax Act, 1954 will operate on the property as a whole and not on the equity redemption. The section creates first charge of the property thus clearly giving priority to the statutory charges over all other charges on the property including the mortgage. When a first charge is created by operation of law on any property that charge will have precedence over the existing mortgage. The appeal was thus decided against the bank and in favour of the Sales-tax Officer.

Cases referred to :

1. *S.B.B.J. vs. National Iron & Steel Rolling Corporation* (1995) 82 Comp Cas 548 (Raj.)

2. *S.B.B.J. vs. National Iron & Steel Rolling Corporation* (1995) 96 STC 493 (Raj.)
3. *Westminster City Council vs. Haymarket Publishing Ltd.* (1981) 2 All ER 555 (CA).
4. *Dattatreya Shanker Mote vs. Anand Chintaman Datar* (1974) 2 SCC 799

Full text of the Judgment is given below :

JUDGMENT

(Sujata V. Manohar, J.)

Leave granted.

The appellant, namely, the State Bank of Bikaner and Jaipur, had given cash credit facilities to respondent No. 1, National Iron and Steel Rolling Corporation. Respondents Nos. 2 to 5 are the partners of respondent No.1. As security for repayment of the amounts advanced to respondent No.1 by the appellant-bank, respondent No.1 created a mortgage of their factory premises situated at Industrial Area, Bharatpur, by a deed of mortgage dated October 18, 1977. They have also, by a letter of promise dated June 10, 1981, pledged the plant and machinery installed in the said premises to the bank as security for the said advances. There is also an agreement for the pledge of movables dated January 7, 1980, executed by the first respondent in favour of the appellant-bank.

The appellant-bank filed Civil Suit No. 5 of 1986 in the court of the Additional District Judge II, Bharatpur, against the respondents for the recovery of a sum of Rs. 3,79,679 due and payable under the above cash credit facility and for future interest at 16.25 per cent. per annum with quarterly rests. In this suit, the appellant-bank also asked for the realisation of the mortgage security under Order 34, rule 4 of the Code of Civil Procedure.

While the suit was pending, the Commercial Taxes Officer, Bharatpur, got himself impleaded in the suit on May 18, 1990, on the ground that he had a prior claim for the recovery of a sum of Rs. 1,19,122 as sales tax dues from respondent No. 1 and was entitled to realise it by sale of the mortgaged property.

The property which is the subject-matter of the mortgage has been sold by auction under the orders of the court for a sum of Rs. 4,02,000 to one Smt. Kamlesh Goel. Under the orders of the court the sale proceeds have been deposited in court. It was contended by the Commercial Taxes Officer, Bharatpur, that the sales tax dues of the first respondent were liable to be paid first out of the sale proceeds. The claim of the appellant-bank could be satisfied only out of the balance amount. The trial court by its judgment and order dated May 18, 1990, accepted this claim of the

Commercial Taxes Officer. The revision petition of the appellant-bank was dismissed by the High Court by the impugned judgment and order. Hence, this appeal by special leave.

The claim of the Commercial Taxes Officer, Bharatpur, rests on the provisions of section 11AAAA of the Rajasthan Sales-tax Act, 1954. Section 11AAAA has been introduced in the Rajasthan Sales-tax Act, 1954, by way of an amendment in 1989. Section 11AAAA is as follows :

> "11AAAA. *Liability under this Act to be the first charge.*- Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax, penalty, interest and any other sum, if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or such person."

Under this section the amount of sales tax or any other sum due and payable by a dealer or any other person under the Rajasthan Sales Tax Act, 1954, is a first charge on the property of the dealer or of such person. It is on account of the provisions of this section that the Commercial Taxes Officer claimed priority for the recovery of the sales tax due from the sale proceeds of the mortgaged property. The appellant, however, contended that since the mortgage in their favour is prior in point of time, their claim will have precedence over the claim of the sales tax authorities.

It is, therefore, necessary to consider the effect of section 11AAAA of the Rajasthan Sales Tax Act, 1954, on an existing mortgage in respect of the property of the dealer or the person liable to pay sales tax or other sums under the Rajasthan Sales Tax Act, 1954. Section 100 of the Transfer of Property Act deals with charges on an immovable property which can be created either by an act of parties or by operation of law. It provides that where immovable property of one person is made security for the payment of money to another, and the transaction does not amount to a mortgage, a charge is created on the property and all the provisions in the Transfer of Property Act which apply to a simple mortgage shall, so far as may be, apply to such charge. A mortgage, on the other hand, is defined under section 58 of the Transfer of Property Act as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced as set out therein. The distinction between a mortgage and a charge was considered by this court in the case of *Dattatreya Shanker Mote vs. Anand Chintaman Datar* (1974) 2 SCC 799. The court has observed (at pages 806 and 807) that a charge is a wider term as it includes also a mortgage, in that, every mortgage is a charge, but every charge is not a mortgage. The court has then considered the application of the second part of section 100 of the Transfer of Property Act which, *inter alia,* deals with a charge not being enforceable against a *bona fide* transferee of the property for value without notice of the charge. It has held that the phrase "transferee of property" refers to the transferee

of the entire interest in the property and it does not cover the transfer of only an interest in the property by way of a mortgage.

In the present case, we have to consider whether the statutory first charge which is created under section 11AAAA of the Rajasthan Sales Tax Act over the property of the dealer or a person liable to pay sales tax and/ or other dues under the Rajasthan Sales Tax Act, is created in respect of the entire interest in the property or only mortgagor's interest in the property when the dealer has created a mortgage on the property. In other words, will the statutory first charge have priority over an earlier mortgage. It was urged by Mr. Tarkunde, learned counsel for the appellant-bank, that at the time when the statutory first charge came into existence, there was already a mortgage in respect of the same property. Therefore, the only property which was possessed by the dealer and/or person liable to pay tax or other dues under the Rajasthan Sales Tax Act, was the equity of redemption in respect of that property. The first charge would operate, therefore, only on the equity of redemption. The argument, though ingenious, will have to be rejected. Where a mortgage is created in respect of any property, undoubtedly, an interest in the property is carved out in favour of the mortgagee. The mortgagor is entitled to redeem his property on payment of the mortgage dues. This does not, however, mean that the property remains with the mortgagor. Therefore, when a statutory first charge is created on the property of the dealer, the property subjected to the first charge is the entire property of the dealer. The interest of the mortgagee is not excluded from the first charge. The first charge, therefore, which is created under section 11AAAA of the Rajasthan Sales Tax Act will operate on the property as a whole and not only on the equity of redemption as urged by Mr. Tarkunde.

We find support for this conclusion in the observations made in *Fisher and Lightwood's Law of Mortgage,* 10th edition at page 33, where the statutory charges are discussed. In dealing with a statutory charge in favour of rating authorities in respect of rating surcharges for unused commercial buildings under the General Rate Act, 1967, it is stated that : "a statutory charge has priority to the interest of the mortgagee under a mortgage existing when the charge arose". In the case of *Westminster City Council vs. Haymarket Publishing Ltd.* (1981) 2 All ER 555 (CA), the English Court of Appeals was required to consider whether a statutory charge on the property under the General Rate Act would have priority over a legal mortgage on the property existing when the charge came into being. It was argued that the charge would be only on the mortgagor-owner's interest in the property, i.e., on the equity of redemption. The court negatived this contention. It held that the "charge on the land" imposed for an unpaid surcharge was not confined to a charge on the owner's interest in the premises when the charge arose, but extended to a charge on all the estates and interests in the premises existing when the charge arose. The rating authority's charge would have priority over the bank's interest as a mortgagee.

In the present case, the section creates a first charge on the property thus clearly giving priority to the statutory charge over all other charges on the property including a mortgage. The submission, therefore, that the statutory first charges created by section 11AAAA of the Rajasthan Sales Tax Act can operate only over the equity of redemption, cannot be accepted. The charge operates on the entire property of the dealer including the interest of the mortgagee therein.

Looked at a little differently, the statute has created a first charge on the property of the dealer. What is meant by a "first charge" ? Does it have precedence over an earlier mortgage ? Now, as set out in *Dattatreya Shanker Mote's* case (1974) 2 SCC 799, a charge is a wider term than a mortgage. It would cover within its ambit a mortgage also. Therefore, when a first charge is created by the operation of law over any property, that charge will have precedence over an existing mortgage.

No other contention has been urged before us. We, therefore, agree with the conclusion arrived at by the High Court. The appeal is, therefore, dismissed. In the circumstances, however, there will be no order as to costs.

(1995) 126 Taxation 299 (SC)

IN THE SUPREME COURT OF INDIA

(Before Hon'ble Mr. Justice B.P. Jeevan Reddy,
Hon'ble Mr. Justice Suhas C. Sen
and Hon'ble Mr. Justice G.T. Nanavati)

Civil Appeal Nos. 1180 of 1991 & 5441-50 of 1995

Gosar Family Trust, Jamnagar etc.

vs.

Commissioner of Income-tax, Rajkot etc.

Decided on : 28-4-1995

RATE OF TAX — Trust set up for two groups of family members — Trust not paying any income to any of the beneficiaries during the year — Only first set of beneficiaries entitled to income at discretion of trustees — Other group of beneficiaries entitled to whole corpus with accumulated income on dissolution — Assessee claiming to be taxed at normal slab rates — Revenue taxing at maximum marginal rate — Held, for purposes of section 164(1) income receivable and not received on behalf of beneficiaries material — Section 164(1) also does not make any distinction between beneficiaries — Trust liable to be taxed at maximum marginal rate.

Income-tax Act, 1961 — Section 164.

FACTS

By a deed dated 3-10-1981, one Shri Hirji Pethraj Shah created a private

trust known as "Gosar Family Trust". The trust was created with a sum of Rs. 500/- with permission to trustees to accept further contribution from any person on such terms and conditions not inconsistent with the objects of the trust. There were two sets of beneficiaries, the first category comprising of three individuals and in the second category were family members of one Shri Devchand Shamji Shah and Smt. Kankuben Gulabchand Shah upto three generations. The life of the trust is 18 years but the trustees have been given absolute powers to distribute the income to the first category of beneficiaries in such proportion and at such time they may think appropriate. At the end of 18 years, the entire corpus with the trust alongwith accumulated income was to be distributed amongst second category of beneficiaries. The contention of the assessee is that the trust is to be taxed at rates applicable to association of persons within the meaning of section 164(1) and not at maximum marginal rate. The Tribunal upheld the contention of the assessee but the Hon'ble High Court held that the income is chargeable to tax at maximum marginal rate.

DECISION

The Hon'ble Apex Court held that the trust is rather curious and the introduction date kept as short as two years and the maximum life 18 years. One beneficiary is common in both the categories. The trustees are not obliged to distribute the income among the first category of beneficiaries during the year they receive it. The first category of beneficiaries thus have no right to receive the income and so also the second category but the second category ultimately gets the entire corpus with accumulations on dissolution of the trust. It is thus evident that the second category of beneficiaries are also beneficiaries as rightly pointed out by the High Court. The beneficiaries have no right to demand the income. Thus neither category has a right but only an expectation to receive it. For the purpose of section 164(1) what is relevant is the income receivable on behalf of the beneficiaries. It is not necessary that the income is received by the beneficiaries. It is, therefore, difficult to say in the light of the recitals of the trust deed that the income receivable only on behalf of first category and not on behalf of the second category. Section 164(1) or the proviso (i) thereto does not make any distinction between the beneficiaries and beneficiaries. It cannot, therefore, be said that the income is received only on behalf of the first category and not the second category beneficiaries. Either category could have received the income wholly to the exclusion of the other or both could have received it partly. The charging of maximum marginal rate was not contrary to law. The appeal of the assessee was thus dismissed.

Cases referred to :

1. *CIT vs. B.A. Sanghrajka Trust*, (1990) Taxation 97 (3) 331 (Bom.); 181 ITR 484 (Bom.)

2. *CIT vs. Mrs. Pushpaben Family Trust*, 207 ITR 587 (Bom.)

Full text of the Judgment is given below :

JUDGMENT

(B.P. Jeevan Reddy, J.)

Leave granted in Special Leave Petitions.

A common question arises in this batch of appeals. For the sake of convenience and with the consent of the counsel for the parties, we treat the facts in Civil Appeal No. 1180 of 1991 (Gosar Family Trust, Jamnagar) as representative of the facts in all the cases. It is agreed by the learned counsel for the appellants that the relevant recitals in the Trust Deeds concerned in all the appeals are identical. The appeals arise from the judgment and orders of the Gujarat High Court.

The High Court has answered the following two questions referred to it, at the instance of the Revenue, under Section 256(2) of the Income-tax Act in favour of the Revenue and against the assessee:

"(1) Whether, in law and on facts and having regard to the provisions of sub-section (1) of section 164 of the Income-tax Act, 1961, the assessee is entitled to the concessional rate of tax ?

(2) Whether, in law and on facts and in view of the provisions of the trust deed, the trust cannot be subjected to maximum marginal rate of tax?"

By a deed dated October 3, 1981, Sri Hirji Pethraj Shah created a private trust known as "Gosar Family Trust". S/Sri Devchand Shamji Shah, (2) Sri Deepak Devchand Shah, (3) Smt. Ladhiben Shamji Shah and (4) Smt. Sunanda Rajesh Shah were named as trustees. The trust was created with a sum of Rupees five hundred. Clause (7) of the Trust Deed, however, permitted the trustees to accept from any person desirous of making contributions to the Trust fund such amounts or properties and upon such terms and conditions as they may think fit subject, of course, that the objects of the contributions are not inconsistent with the objects of the trust. There are two sets of beneficiaries. The first category comprises three individuals, viz., (1) Sri Gosar Devashi Jakharia, (2) Smt. Lakhmaben Gosar Jakharia and (3) Sri Mukesh Gosar Jakharia. (Nos. 2 and 3 are wife and son respectively of No. 1). The second category of beneficiaries are : (1) Smt. Lakhmaben Gosar Jakharia, (2) family members of Sri Devchand Shamji Shah and (3) Smt. Kankuben Gulabchand Shah upto three generations. The recitals in the trust deed are little unusual and may be noticed (as condensed by us) :

(1) The life of the trust is eighteen years. But after the expiry of two years, the trustees have the discretion to terminate the trust at any time.

(2) With respect to the income from the trust properties, the trustees have been given an absolute discretion to distribute the same among the first category beneficiaries in such manner and in such proportion and at such times as they think appropriate. The trustees are vested with absolute discretion not to distribute the income to any one and to accumulate it.

(3) At the end of eighteen years or at such time as the trustees put an end to the trust, the corpus of the trust and all income accumulated, if any, shall be distributed among the second category beneficiaries, again in such proportion and in such manner as the trustees may decide.

(4) The trustees have been expressly empowered to invest the trust funds in any firm or joint stock companies in which any one or more of the trustees may be partners, directors or shareholders, as the case may be.

The trust is undoubtedly a discretionary trust. The only question in this appeal is whether the income of the trust taxed in the hands of the trustees is chargeable at the maximum marginal rate or at the rate applicable to the association of persons within the meaning of Section 164(1) of the Income-tax Act. While the Tribunal has held that the rate applicable is the rate relevant to the association of persons by virtue of proviso (i) to Section 164(1), the High Court is of the opinion that proviso (i) is not attracted in this case and, therefore, the income is chargeable at the maximum marginal rate. It would be appropriate to read Section 164(1) insofar as it is relevant at this stage :

"Charge of tax where share of beneficiaries unknown.

164(1) Subject to the provisions of sub-sections (2) and (3), where any income in respect of which the persons mentioned in clauses (iii) and (iv) of sub-section (1) of section 160 are liable as representative assessees or any part thereof is not specifically receivable on behalf or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown (such income, such part of the income and such persons being hereafter in this section referred to as "relevant income", "part of relevant income" and "beneficiaries", respectively), tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate :

Provided that in a case where—

(i) none of the beneficiaries has any other income chargeable under this Act exceeding the maximum amount not chargeable to tax in the case of an association of persons or is a beneficiary under any other trust....... (Clauses (2), (3) and (4) omitted as unnecessary.)

tax shall be charged on the relevant income or part of relevant incomes as if it were the total income of an association of persons :

(Rest of the section omitted as unnecessary.)"

The sub-section contemplates charging of tax at maximum marginal rates in two situations, viz., (a) where any income, in respect of which the trustees (omitting unnecessary categories of persons) are liable to be assessed as representative assessees, is not specifically receivable on behalf or for the benefit of any one person and (b) where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown. The first proviso, however, says *inter alia* that where none of the beneficiaries has any other income chargeable to tax in the case of an association of persons or is a beneficiary under any other trust, tax shall be charged on the relevant income as if it were the total income of an association of persons. In this case, none of the first category beneficiaries has taxable income under the Act within the meaning of proviso (i), while the second category beneficiaries do have such income. This means that if the second category beneficiaries are also treated as beneficiaries for the purpose of proviso (i), the trust income is liable to be charged at the maximum marginal rate. If, on the other hand, only the first category beneficiaries are treated as beneficiaries (and not the second category beneficiaries) within the meaning of proviso (i), then the trust income is liable to be charged in the hands of the trustees at the rate applicable to the association of persons. For this reason, the assessees' contention has been that only the first category beneficiaries are beneficiaries within the meaning of proviso (i) while the Revenue contends to the contrary. The reasoning of the High Court on which it has held against the assessee is to be found in the following three paragraphs :

"There is no dispute about the fact that the income was not specifically receivable on behalf of or for the benefit of anyone person and that the individual shares of beneficiaries were indeterminate or unknown. Therefore, the provisions of section 164(1) are attracted to the type of arrangement made under this trust. The argument that only the first set of beneficiaries who may receive the income are the class envisaged by sub-section(1) of section 164 and not the type of beneficiaries who may, ultimately, get the accumulated income on distribution is not warranted by the wording of the provision which includes the entire class of beneficiaries on whose behalf or for whose benefit the income is receivable by the trustee.

The trustees receive or are entitled to receive the income (under the deed) on behalf of or for the benefit of both the sets of beneficiaries and are their representative assessees under section 160(1)(iv). It cannot be said that they do not receive the income for the benefit of the second set or "tier" of beneficiaries (described as corpus beneficiaries). The

trustees are empowerd to accumulate the income for the benefit of the second set of beneficiaries and, therefore, they receive or are entitled to receive the income on behalf of or for the benefit of such second set of beneficiaries also notwithstanding the existence of the first set of beneficiaries to whom they may distribute the income if they so choose to do. The existence of the authority of the trustees to disburse the income they receive under the trust to the first set of beneficiaries does not militate against their entitlement to receive the income on behalf of or for the benefit of the other set for whom they can legitimately accumulate it for eventual distribution. The trustees were entitled to receive the income under this trust on behalf of or for the benefit of the entire class of beneficiaries notwithstanding the fact that they had a discretion to bestow the benefit to one beneficiary or one set of beneficiaries at the cost of the others. The fact that the income so received is disbursed to some and not to others or is disbursed now or accumulated for future disbursement should make no difference and will not change the nature of the arrangement made under the trust, namely, that the trustees receive or are entitled to receive the income for the benefit of or on behalf of the entire class of beneficiaries named in the trust.

The fact that the trustees are not obliged to disburse the income or accumulate it for the benefit of the first set or the second set of beneficiaries or any of them would itself indicate that the income is receivable by the trustees for the whole class of beneficiaries irrespective of the ultimate manner in which the income is distributed."

The High Court further pointed out that for the purpose of Section 164, it is not necessary that the beneficiaries do actually receive the income. It is sufficient, it held, that the income is receivable by the trustees for the benefit of the persons named in the trust. The High Court observed, "the real question is whether the persons named in the trust have an interest, whether vested or contingent, in the income that is receivable on their behalf" and answered the question by saying that both the categories of beneficiaries mentioned in the trust deed have an interest in the trust and the income of the trust is received by the trustees on their behalf.

Sri Eradi, learned counsel for the assessees contended that the second category of beneficiaries cannot be called "beneficiaries" with respect to the income of trust for the reason that they are not entitled to any portion of income; they are entitled only to the corpus. Only the first category beneficiaries are entitled to the income for the trust, it is submitted. When Section 164 speaks of income and it being taxed at a particular rate, it is having in mind the particular year in which the income is received by the trustees and is being taxed in their hands. Counsel further submitted that even if the trustees decide not to distribute the income and accumulate

it, it forms part of the corpus which is distributed among the second category beneficiaries at the end of eighteen years or earlier whenever the trust is put an end to by the trustees in their discretion. Strong reliance is placed upon the decision of the Bombay High Court in *Commissioner of Income-tax vs. B.A. Sanghrajka Trust* (181 ITR 484) where construing similar terms of a trust deed, the Bombay High Court held that the second category beneficiaries cannot be treated as beneficiaries within the meaning of proviso (i). It is brought to our notice that the said decision has been followed later by the same High Court in *Commissioner of Income-tax vs. Mrs. Pushpaben Family Trust* (207 ITR 587).

We must say that the trust deed in question is rather a curious one. It is effective only for a limited period which can be as short as two years. If, in case, the trustees do not choose to put an end to the trust, even then the maximum life of the trust is eighteen years only. One beneficiary is common to both the first and second categories, viz., Smt. Lakhmaben Gosar Jakharia. The trustees are not obliged to disburse or distribute the income among the first category beneficiaries in the year they receive it. They need not pay a single pie to any of the beneficiaries in the first category at any time during the currency of the trust; they are entitled to accumulate the whole income which will then pass to the second category beneficiaries as and when the trust comes to an end. In other words, the first category beneficiaries have no *right* to receive the income. So have the second category beneficiaries no right to receive any income though they may ultimately get the whole or part of the income along with the corpus on the expiry of the period of trust. The trustees are expressly entitled to deposit the monies of the trust fund in any firm or joint stock company in which anyone or more of them is/are partners/directors/shareholders, which means that the trustees could as well have decided not to distribute a single pie and invest all the income and corpus found for the full period of eighteen years in their own firms and concerns. No less surprising is the provision that the trust started with a mere rupees five hundred and the trustees have been given absolute discretion not only in the matter of distribution of income but also in the matter of very continuance of the trust. At any time after the expiry of two years they can put an end to it if they so choose.

The ingenuity of the assessee and the naivet of the department in espousing and accepting such a trust is remarkable. Be that as it may, we have to answer the question, whether the second category beneficiaries are not "beneficiaries" within the meaning of proviso (i) to Section 164(1) on the above facts? We are of the considered opinion that the second category beneficiaries are also beneficiaries as rightly pointed out by the High Court. If the income is not distributed among the first category beneficiaries, the whole income - or such part of it as may not have been distributed among the first category - goes to the second category. There is no reason why it cannot be said that the income is received by the trustees on behalf of

both the categories of beneficiaries. Indeed, there is no distinction between the two categories so far as the income of the trust is concerned. The members of the first category too have no *right* to demand or receive income. They may or may not receive any income. It may well happen that they may not get a single pie either in the year concerned or during the entire period of the trust. If so, how it is being said that income is being received on their behalf. The second category beneficiaries too have no right to the income but yet they may get whole of it or such part of it as may not have been distributed or paid to first category. Thus, neither category has a *right* but only an expectation to receive income. In this sense, members of the second category are as much beneficiaries as the members of the first category. The trustees are entitled to choose not to pay a pie out of the income to anyone and invest the whole of it in their own concerns. They were also under no obligation to disburse or distribute the income received in an year in that year or in the following year. For the purpose of Section 164(1) what is relevant is that the income is receivable on behalf of the beneficiaries. It is not necessary that the income is received by the beneficiaries. It is, therefore, difficult to say in the light of the recitals of the trust deed that the income is receivable only on behalf of the first category but not on behalf of the second category beneficiaries. Indeed, Section 164(1) or the proviso (i) thereto does not make any distinction between beneficiaries and beneficiaries - nor is the said expression defined in the Act. It would, therefore, be reasonable to construe and understand the expression "beneficiaries" in its ordinary and normal sense, which means that both categories are beneficiaries. Situation could probably have been different if there had been an *obligation* upon the trustees to distribute the income received in an year in that very year or in the following year(s) in which event it could probably be said that the trust income is receivable by the trustees on behalf of or for the benefit of the first category beneficiaries only. In this case, there is no such obligation and the income not distributed ultimately goes to the second category. It is immaterial whether that income becomes a part of corpus or not. What is material is that it goes to the second category. It cannot, therefore, be said that income is received only on behalf of the first category and not the second category beneficiaries. Either category could have received the income wholly to the exclusion of the other or both could have received it partly in the manner explained above. We are, therefore, unable to agree with the contentions urged by the learned counsel for the assessees. The charging of maximum marginal rate was not contrary to law.

Now, coming to the decision of the Bombay High Court in *Sanghrajka Trust*, the High Court has construed the trust deed concerned therein to mean that the daughter-in-law (comparable to second category in our case) had no right or interest in the income of the trust for any year but it did not attach sufficient importance of the other recital in the trust deed that

the trustees were entitled in their discretion not to disburse any income to the grand daughters (comparable to first category in our case) of the settlor in which case the entire income would have gone to the daughter-in-law at the expiry of the trust. The daughter-in-law may not have had a *right* to the income of the trust, but so did the grand daughters too did have no right. The said decision, therefore, cannot advance the case of the appellants herein.

We must say that the policy of law as disclosed from Section 164(1) is to discourage discretionary trusts by charging the income of such trusts in the hands of trustees at the maximum marginal rate except in certain specified situations. The trust deed concerned herein is a discretionary trust of an extremely unusual type. Since it is stated that the Tribunal has found the trust deed to be a genuine one, we do not wish to say anything more on this score.

For the above reasons, the appeals fail and are dismissed with costs.

(1995) 126 Taxation 307 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta & Hon'ble Mr. Justice Nure Alam Chowdhury)

IT Reference No. 14 of 1992

Commissioner of Income-tax

vs.

Algemene Bank Netharland

Decided on : 4-8-1993

BAD DEBT — Assessee bank advancing certain loans — Loans not paid — Assessee obtaining decree — After scrutiny assessee coming to the conclusion amount not recoverable — Amount written off as bad debt — Held, honest judgment on the part of the assessee when the debts were written off — Assessee had reasonable belief debt could not be realised and hence justified in writing off.

Income-tax Act, 1961 — Section 36(2).

FACTS

Shortly stated, the facts are that the assessee, Algemene Bank Netharland, N.V. is a non-resident company doing banking business in India. The A.Y. involved in this reference is 1979-80. The assessee claimed the following two items as bad debts while computing the income from business :

(i) Associated Industrial Products Co. Rs. 40,262/-

(ii) Mining & Equipment Manufacturers Rs. 6,122/-

Regarding the first item, the said party was given overdraft facility on the pledge of goods. The party did not repay the loan. The pledged goods were sold during the previous year under consideration and a sum of Rs. 503 was realised. After getting the report dated 8.2.1978 of a private investigator who reported that there was no chance of any recovery, the balance of Rs. 40,262/- due from that party was written off as bad debt. By an order of the Court the partners of the aforesaid debtor firm were declared insolvent.

DECISION

The Hon'ble Court held that whether a debt has become bad or not is essentially a question of fact and must be considered in the context and setting of facts of a particular case. In this case, no one has challenged the reports of the private investigator. The bank, as a prudent business concern, may, on the facts of a particular case, bonafidely decide that there is no ray of hope of recovery of any part of the debt. The Hon'ble court held that on the facts and in the circumstances of this case, the assessee could reasonably hold the belief that the debt cannot be reasonably expected to be realised. This is a case of honest judgment on the part of the assessee at the time when the debts were written off in the light of the events up to that stage and not in the light of later happenings. The fact that the debtors have no assets and even the partners of the firm were declared insolvent was a sufficient indication that the debt could not be realised any further. The questions were answered in favour of the assessee.

Case referred to :

Jethabhai Hirji and Jethabhai Ramdas vs. CIT (1979) 120 ITR 792 (Bom.)

Full text of the Judgment is given below :

JUDGMENT

(Ajit K. Sengupta, J.)

In this reference under section 256(2) of the Income-tax Act, 1961 ('the Act') for the assessment year 1979-80, the following questions of law have been referred to this Court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the loans of Rs. 40,262 and Rs. 6,122 for the Associated Industrial Products Company and Mining and Equipment Manufacturers, respectively, have become recoverable in the relevant year and in that view in allowing the assessee's claim of bad debts for the above sums?

2. Whether, there was any material for the Tribunal to hold that the assessee could have entertained a *bona fide* belief that the loans of Rs. 40,262 and Rs. 6,122 from Associated Industrial

Products Company and Mining and Equipment Manufacturers, respectively, became recoverable and whether such finding and order of the Tribunal is otherwise unreasonable and perverse?"

Shortly stated, the facts are that the assessee, Algemene Bank Netharland, N.V. is a non-resident company doing banking business in India. The A.Y. involved in this reference is 1979-80.

The assessee claimed the following two items as bad debts while computing the income from business:

(i) Associated Industrial Products Co. Rs. 40,262/-

(ii) Mining & Equipment Manufacturers Rs. 6,122/-

Regarding the first item, the said party was given overdraft facility on the pledge of goods. The party did not repay the loan. The pledged goods were sold during the previous year under consideration and a sum of Rs. 503 was realised. After getting the report dated 8.2.1978 of a private investigator who reported that there was no chance of any recovery, the balance of Rs. 40,262 due from that party was written off as bad debt. By an order of the Court the partners of the aforesaid debtor firm were declared insolvent. The ITO rejected the claim of the assessee on the ground that the assessee obtained a decree in its favour and so there was still a chance of realisation of the debt. On appeal, the Commissioner (Appeals) confirmed the action of the ITO.

Regarding the second item of Rs. 6,122, the assessee had obtained a decree against the said party and so the ITO disallowed the same on the only ground that there was a chance of recovery. On appeal, the Commissioner (Appeals) confirmed the action of the ITO.

The assessee appealed to the Tribunal and contended that the loans were given in the ordinary course of the banking business carried on by the assessee. In the calendar year 1978 which is the relevant previous year, the assessee came to the clear conclusion on the basis of the investigation made by it that these loans had become irrecoverable notwithstanding the fact that decrees had been obtained against the parties. Relying on the decision in the case of *Jethabhai Hirji and Jethabhai Ramdas vs. CIT* (1979) 120 ITR 792 (Bom.), it was urged that the claim of the assessee should have been allowed as the assessee bonafidely believed that the loans had indeed become irrecoverable and so wrote off the same from its books of account. On the other hand, it was urged on behalf of the department that there was still hope of recovery because of the decrees obtained by the assessee even though the investigation of the assessee showed that there were no assets of the debtors to satisfy the decrees.

The Tribunal considered the contentions of both the parties as well as the facts on record. They found that the only ground for disallowing the two amounts under consideration as given by the revenue authorities was that

there was still a chance of recovery. The Tribunal found that if the assessee was bonafidely convinced that the debt had become bad, then the same could be written off and claimed as deduction even though some legal proceedings wer . pending for recovery of the said debt. This was the ratio of the decision in the case of *Jethabhai Hirji and Jethabhai Ramdas* (supra). The Tribunal went through the report of the Investigating Officer received by the assessee in the calendar year 1978 and was satisfied that the assessee could have entertained a *bona fide* belief that the two loans under consideration had become irrecoverable. Hence, the Tribunal allowed the claim of the assessee in respect of the two items under consideration.

No one appeared for the assessee. Accordingly, Mr. J.P. Khaitan, Advocate, was appointed *amicus curiae* and he has ably assisted the Court. He has submitted that the second question allowed by the Court which challenges the finding of fact being perverse was not raised by the Commissioner. There is no doubt substance in this contention but the matter can be decided on the facts found and/or admitted by the Tribunal. The only question which falls for consideration is whether the debt had become bad during the previous year under consideration. The bank obtained a report dated 8.2.1978 of a private investigator. This report states that one of the debtors, Mining and Equipment Manufacturer did not have any asset in order to repay the debt and no legal proceeding for realisation of the dues would be justified. Similarly, in the case of the other debtor, i.e., Associated Industrial Products Co., a private investigator was engaged to enquire into the financial position of the said debtor and on 2.1.1978, the investigator reported that there were no assets out of which the assessee could hope to recover the amount due to it by the said concern and both the partners of the said concern had been declared insolvent by the Court. The only ground on which the foresaid amounts were disallowed is that there was still chance of recovery at the end of the previous year because the assessee obtained decrees against the debtor and the Court proceeding had not yet come to an end. It is no doubt true that the suits were filed and decrees were obtained but merely because the suits were filed and decrees were obtained but merely because the suits were decreed cannot lead to the conclusion that there is still hope for a possibility of recovering the debts or the debts are realisable. As a matter of fact the partners of one of the debtors (Associated Industrial Products) were declared insolvent. The question is not whether a decree has been obtained or the firm is in existence or the partners are traceable. The question is whether having regard to the facts and circumstances of the case, the assessee could have entertained a *bona fide* belief that the aforesaid two amounts of debt became irrecoverable and whether it would be unwise as a prudent businessman to proceed with the execution of the decrees or to institute proceedings against the partners who might have been traceable.

Whether a debt has become bad or not is essentially a question of fact

and must be considered in the context and setting of facts of a particular case. It is no doubt true that the debt becomes bad not when the creditor (assessee) is minded to treat it so at a particular time but at and from the particular point of time it was no longer possible to recover, as the debtor had no means or assets to repay and the circumstances made it plain that recovery would not be possible. In this case, no one has challenged the reports of the private investigatior. The bank, as a prudent business concern, may, on the facts of a particular case, bonafidely decide that there is no ray of hope of recovery of any part of the debt. In view of the involved circumstances of the debtor, continuance of the proceedings for recovery may be found to be utterly meaningless as the only result of such pursuit is that good money would be spent without any hope of return. If the debtors have no assets, decree will remain unexecutable and will be mere paper decree.

In our view, on the facts and in the circumstances of this case, the assessee could reasonably hold the belief that the debt cannot be reasonably expected to be realised. The assessee, a non-Indian banking company, on the strength of the reports of the investigators, which have not been challenged by the revenue, felt honestly convinced that the financial position of the debtors was so precarious and shaky that it would be impossible to collect any money from them. This is a case of honest judgment on the part of the assessee at the time when the debts were written off in the light of the events up to that stage and not in the light of later happenings. The later happenings only justify the belief which was formed at the time of writing off of the debts. The facts that the debtors have no assets and even the partners of the firm were declared insolvent was a sufficient indication that the debt could not be realised any further. The decrees are merely paper decrees which does not establish that there was still a chance of realisation of the debts.

For the reasons aforesaid, the first question is answered in the affirmative and in favour of the assessee; the first part of the second question is also answered in the affirmative and the second part in the negative, both in favour of the assessee.

There will be no order as to costs.

Chowdhury, J. - I agree.

(1995) 126 Taxation 312 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta &
Hon'ble Mr. Justice Shyamal Kumar Sen)

IT Reference No. 74 of 1990

S.P. Jaiswal Estates (P) Ltd.

vs.

Commissioner of Income-tax

Decided on : 22.9.1993

INDUSTRIAL COMPANY — Assessee running hotel — Having more than 50% income from manufacture of eatables, food and drinks — Claiming to be industrial company — Held, assessee carrying on manufacture or processing of goods — Entitled to benefits of industrial company.

Finance Act, 1982 — Section 2(7)(c).

FACTS

This reference relates to the A.Y. 1982-83. The assessee company runs a 5-Star hotel in Calcutta styled 'Hotel Hindustan International'. The only issue involved in this reference relates to the rate of income-tax chargeable on the total income of the assessee company for the year under reference. The ITO charged tax at the rate of 65% by treating the assessee as a non-industrial company. This order was confirmed in appeal by the CIT(A) as well as the Tribunal.

DECISION

In order to claim investment allowance under section 32A, the assessee must own an industrial undertaking and the relevant machinery or plant should be installed and used for the purposes of business of construction, manufacture or production of any article or thing. The activity of processing is not referred to in sub-section (2) of section 32A but the definition of industrial undertaking as contained in section 2(7)(c) of the Finance Act, 1982 specifically provides that a company will be an industrial company even when it is engaged in the processing of goods. There can be no doubt that in the process of manufacturing eatables, food and drinks, the assessee-company does carry out a processing activity through different raw-materials like vegetables, meat, fish, spices and so on for catering to the needs of the customers. The income from such activity is clearly seen to be more than 51 per cent of the total income as assessed by the ITO for the assessment year under reference. The activity carried out in a restaurant was nothing but manufacture or processing of goods and the assessee company running a restaurant is an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1978. The word 'processing' was broad enough to take in the activity of processing of goods and rendering the eatables fit

for selling them to its customers. The Hon'ble Court was, therefore, of the view that the assessee is an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1982 and is accordingly chargeable to concessional rate.

Cases referred to :

1. *CIT vs. S.P. Jaiswal Estates (P) Ltd.* (1992) 196 ITR 179 (Cal.)
2. *CIT vs. Sky Room (P) Ltd.* (1992) 195 ITR 763 (Cal.)
3. *CIT vs. Casino (P) Ltd.* (1973) 91 ITR 289 (Ker.)
4. *G.A. Renderian Ltd. vs. CIT* (1984) 145 ITR 387 (Cal.)
5. *Chowgule & Co. (P) Ltd. vs. UOI* AIR 1981 SC 1014
6. *Nu-Look (P) Ltd. vs. CIT* (1986) 157 ITR 253 (Del.)

Full text of the Judgment is given below :

JUDGMENT

(Ajit K. Sengupta, J.)

In this reference under section 256(1) of the Income-tax Act, 1961, made at the instance of the assessee, the following questions have been referred to this Court:

> "1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the company was not an industrial company mainly engaged in manufacture of goods?
>
> 2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the rate of income-tax applicable to the company will be that applicable to a non-industrial company?"

This reference relates to the income-tax assessment of the assessee company for the previous year ending on 26.10.1981 corresponding to the A.Y. 1982-83. The assessee company runs a 5-Star hotel in Calcutta styled 'Hotel Hindustan International'. The only issue involved in this reference relates to the rate of income-tax chargeable on the total income of the assessee company for the year under reference. The ITO charged tax at the rate of 65% by treating the assessee as a non-industrial company. This order was confirmed in appeal by the CIT(A) as well as by the Tribunal. The case of the assessee is that it is an industrial company and it should be charged to tax at the rate of 60 per cent which is applicable to an industrial company under the Finance Act, 1982. At the outset we would like to mention that this Court has considered the case of the assessee-company in the context of its claim for investment allowance under section 32AB of the Act in respect of the assessment year 1981-82. There the question was whether the Tribunal was justified in law in holding that production of any article or thing within the meaning of section 32A of the Act and in that view whether the assessee was entitled to get investment allowance under that

section. This Court held that an assessee who claims an investment allowance under section 32A has to be an industrial undertaking carrying on the business of manufacturing and producing any article or thing. The business of hotel is distinct and separate from an industrial undertaking manufacturing or producing articles. Though a hotel also produces eatables from raw materials, such manufacturing or producing of goods that may be involved therein is only incidental or ancillary to the business of hotel running. There is no scope for separation of the integrated activity of the industrial undertaking and treating any part thereof as an activity of the nature referred to in section 32A. Therefore, this Court held that preparation of food in a hotel does not constitute manufacture of production of any acticle or thing within the meaning of section 32A and the assessee running the hotel is not entitled to investment allowance under the said section. The decision of this Court in *CIT vs. S.P. Jaiswal Estates (P) Ltd.* (1992) 196 ITR 179.

Having regard to the decision of this Court in the assessee's own case for the assessment year 1981-82, there would have been no difficulty in answering the first question in the affirmative and against the assessee, but on reading the statement of the case as sent by the Tribunal as well as the order of the Tribunal, it appears to us that the real controversy involved in this case in relation to the assessment year 1982-83 is not whether the assessee-company could be said to have been engaged in the manufacture of good; but the controversy is whether the assessee could be said to be an industrial company or not for the purpose of determining the rate of taxes applicable to it under the relevant Finance Act, 1982. Therefore, it is necessary to reframe question No. 1 as under:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee-company was not an industrial company ?"

At the hearing of this reference Mr. Poddar, the learned counsel appearing for the assessee, invited our attention to the definition of the expression 'industrial company' as given in section 2(7)(c) of the Finance Act, 1982. It is common ground that the expression 'Industrial company' is not defined in the Act and its definition is contained only in the relevant Finance Act, 1982. It would be convenient to set out the said definition of the expression 'Industrial company' as contained in section 2(7)(c).

(c) 'industrial company' means a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining.

Explanation. - For the purposes of this clause, a company shall be deemed to be mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in the mining, if the income

attributable to any one or more of the aforesaid activities included in its total income of the previous year (as computed before making any deduction under Chapter VI-A of the Income-tax Act) is not less than fifty-one per cent of such total income.

Mr. Poddar also drew our attention to Circular No. 103, deted 17.2.1973 *see Taxmann's Direct Taxes Circular*, Vol. 1, 1985 edn., p. 1393 issued by the CBDT explaining the meaning of industrial company under *Explanation* to section 2(7)(d) of the Finance Act, 1966. It was explained by Mr. Poddar that the expression 'Industrial company' is defined each year by the relevant Finance Act and the definition as contained in the Finance Act, 1982 is on the same lines as contained in the Finance Act, 1966. The relevant circular is also set out here-in-below for the sake of convenience:

"Meaning of industrial company under *Explanation* to section 2(7)(d):

1. Under sub-section (7)(d) of section 2 of the Finance Act, 1966, an 'industrial company, means a company which is mainly engaged in the business of generation or distribution of electricity or any other form of goods or in mining. According to the *Explanation* to clause (d) of sub-section (7) of the section 2, a company shall be deemed to be mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or aforesaid activities included in its total income for the previous year is not less than fifty-one per cent of such total income.

2. The question as to the exact meaning of the *Explanation* to sub-section (7)(d) of section 2, came up for the consideration and the Board are advised that an 'industrial company' would mean -

(a) a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining, even if its income from such activities is less than 51 per cent of its total income; and

(b) a company which, even though not mainly so engaged, derives in any year 51 per cent or more of its total income from such activities.

Circular No. 103, dated 17.2.1973 *see Taxmann's Direct Taxes Circular*, Vol. 1, 1985 edn., p. 1393".

It was submitted by Mr. Poddar that the assessee-company in course of its hotel business has to manufacture and process various types of eatables, like vegetable, meat, fish, spices and so on for catering to the needs of the customers. The raw materials used in the process are clearly different and distinct from the finished product. The finished products like eatables, foods and drinks are even liable to sales tax as sale of goods. From the

printed accounts of the assessee-company for the year under reference, Mr. Poddar, the learned counsel for the assessee drew our attention to the following figures :

	Rs.
Restaurant receipts from food, beverages account	43,92,799
Less : Cost of food and beverages consumed	21,60,667
Earnings from restaurant	22,32,132
Net Profit as per profit and loss account	17,40,784
Assessed total income as per the assessment order	22,52,840

It was submitted by Mr. Poddar that the total income as assessed by the ITO in respect of the assessment year 1982-83 now under reference vide his order dated 6.11.1984 passed under section 143(3) of the Act was Rs. 22,52,840 which included earnings from restaurant to the extent of Rs. 22,32,132. In other words earnings from restaurant are more than the net profit as per profit and loss account and are also more than 51 per cent of the assessed total income of the assessee-company for the relevant previous year.

Our attention has been drawn to decision of this Court in *CIT vs. Sky Room (P.) Ltd.* (1992) 195 ITR 763, where the judgment was delivered on 7.3.1989. In that case, the question was whether the assessee could be treated as an industrial company. The assessee in that case was engaged in business wholly in processing goods, rendering them edible and then selling them in its restaurants as foodstuff and eatables. In that case, it was held that the assessee was engaged in processing of goods and accordingly, the Court held that the Sky Room (P) Ltd was an industrial company within the meaning of section "2(7)(C) of the Finance Act, 1978. There the court held that the word `processing' is broad enough to take in the activity of purchasing of goods and rendering them edible and selling them to its customers or the guests of the hotel as foodstuff and eatables.

Our attention has also been drawn to a decision of the Kerala High Court in *CIT vs. Casino (P.) Ltd.* (1973) 91 ITR 289, where the Kerala High Court held that a hotel was mainly a trading concern. It would not be appropriate in the ordinary sense to refer to the production of the food material in a hotel as manufacture. This case was distinguished by this Court in *Sky Room (P.) Ltd.* (supra), where the Court observed that before the Kerala High Court, the categorical finding was that hotel activity was the main activity, it was not engaged mainly in the activity of manufacture or production of goods. The ratio of the judgment was quite different and was given in a different context of facts. Accordingly, it was not necessary for this Court in *Sky Room (P.) Ltd.'s* case (supra) follow the decision of the Kerala High Court in *Casino Pvt. Ltd.* case (supra). On the other hand, this Court relied on an earlier decision of this Court in G.A. *Renderian*

Ltd. vs. CIT (1984) 145 ITR 387. In that case, the assessee, who carried on the business of purchasing tea of different qualities and blending the same by mixing one type with another, claimed that it was an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1978, and was entitled to concessional rate of tax. This Court held that the assessee was an industrial company entitled to this benefit. There, this Court considered in detail the meaning of the word 'processing'.

There, this Court followed the decision of the Supreme Court in the case of *Chowgule & Co. (P.) Ltd. vs. Union of India* AIR 1981 SC 1014. The question involved before the Supreme Court was whether blending of ore of different qualities for obtaining ore or requisite specification amounted to processing within the contemplation of the Central Sales Tax Act. The Supreme Court observed that though the blending of different qualities of ore possessing differing chemical and physical composition so as to produce ore of the contractual specification could not be said to involve the process of manufacture since the ore that was produced could not be regarded as a commercially new and distinct commodity from the ore of different specifications blended together, the operation of blending would amount to 'processing' of ore within the meaning of section 8(3)(b) and rule 13. This Court, after considering the aforesaid Supreme Court decision and other decisions on this point, held that the word 'processing' used in the definition of 'industrial company' in section 2(7)(c) of the Finance Act, 1978, has not been defined in the Act, and it must, therefore, by interpreted according to its own natural meaning. Webster's Dictionary gives the following meaning of the word 'process' to subject to some special process or treatment, to subject (especially raw material) to a process of manufacture, development or preparation for the market, etc., to convert into marketable form as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking. Where, therefore, any commodity is subjected to process or treatment with a view to its 'development or preparation for the market', as, for example, by sorting and repacking fruits and vegetables, it would amount to processing of the commodity.

The nature and extent of processing may vary from case to case; in one case, the processing may be slight and, in another, it may be extensive; but with each process suffered, the commodity would experience a change. Wherever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. The nature and extent of the change is not material. The question is not whether there is manual application of energy or there is application of mechanical force. Whatever be the means employed for the purpose of carrying out the operation, it is the effect of the operation on the commodity that is material for the purpose of determining whether the operation constitutes 'processing'.

Mr. Poddar also referred to the decision of the Delhi High Court in *Nu-Look (P.) Ltd. vs. CIT* (1986) 157 ITR 253. There the assessee-company made readymade garments and also carried out tailoring of clothes for customers. The making of clothes or garments according to the order of customers was held to be a case of manufacturing or processing of goods. Mr. Poddar finally submitted that having regard to the principles laid down in the aforesaid cases and more particularly in the light of the decision of this Court in *Sky Room (P.) Ltd.'s* case (supra) as well as the Board's Circular referred to hereinabove, the assessee-company must be held to be an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1982 and should, accordingly, be held to be chargeable to tax at the concessional rate of 60 per cent rather than 65 per cent levied by the ITO.

As already stated earlier, the controversy involved in this reference is clearly different from the one which was considered by this Court in the case of the assessee itself in relation to the assessment year 1981-82, the judgment whereof is in *S.P. Jaiswal Estates (P.) Ltd.'s* case (supra). In order to claim investment allowance under section 32A, the assessee must own an industrial undertaking an the relevant machinery or plant should be installed and used for the purposes of business of construction, manufacture or production of any article or thing. The activity of processing is not referred to in sub-section (2) of section 32A but the definition of industrial undertaking as contained in section 2(7)(c) of the Finance Act, 1982 specifically provides that a company will be an industrial company even when it is engaged in the processing of goods. There can be no doubt that in the process of manufacturing eatables, food and drinks, the assessee-company does carry out a processing activity through different raw-materials like vegetables, meat, fish, spices and so on for catering to the needs of the customers. The income from such activity is clearly seen to be more than 51 per cent of the total income as assessed by the ITO for the assessment year under reference. Although this criterion is not relevant in the light of Circular No. 103, dated 17.2.1983 issued by the CBDT, the CBDT has clarified that even if the income from the activity of manufacture or processing of goods is less than 51 per cent of its total income, the company may be said to be one which is mainly engaged in the business of manufacture or processing of goods. The CBDT has, therefore, stated that a company which even though not mainly so engaged, derives in any year 51 per cent or more of its total income from such activities like manufacture or processing or goods, it can be held to be an industrial company.

This very issue was considered by this Court in *Sky Room (P.) Ltd.'s* case (supra). There this Court distinguishing the decision of the Kerala High Court in *Casino (P.) Ltd.'s* case (supra) held that the activity carried out in a restaurant was nothing but manufacture or processing of goods and the assessee-company running a restaurant in that case was held to be an industrial company with the meaning of section 2(7)(c) of the Finance Act, 1978. There the Court held that the word 'processing' was broad enough

to take in the activity of processing of goods and rendering the eatables fit for selling them to its customers.

We are of the view that the assessee is an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1982 and is, accordingly, chargeable to concessional rate of income-tax. In that view of the matter we answer the reframed question No. 1 as well as question No. 2 as referred to by the Tribunal in the negative and in favour of the assessee.

There will be no order as to costs.

Shyamal Kumar Sen, J. - I agree.

(1995) 126 Taxation 319 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Justice Y.R. Meena & Hon'ble Mr. Justice V.K. Singhal)

DBIT Reference No. 71 of 1987

Commissioner of Income-tax

vs.

M/s Shiv & Brothers

For the Appellant	:	**G.S. Bapna**
For the Respondent	:	**N.M. Ranka**
Decided on	:	7.2.1995

LEVY OF INTEREST — Return filed as registered firm — Assessment completed — Assessee having paid more tax and advance-tax — Ultimately assessment resulting in a refund — Revenue charging interest u/s 139(8) treating the firm as unregistered — Held, since tax paid was more than tax levied, no interest chargeable — Firm not to be treated as unregistered.

Income-tax Act, 1961 — Section 139(8).

FACTS & DECISION

Assessee is a contractor. The assessment was completed ex-parte at a figure of Rs. 82,353/- in the status of registered firm since the assessee had paid more tax and advance tax which resulted in a refund. The revenue tried to levy interest u/s 139(8) treating the firm as unregistered. The Hon'ble Court held that this point was covered in the decision of this court in CIT vs. Builders Engineers Co. (175 ITR 371) and as such no interested was payable and the firm could not be treated as unregistered for the purpose of charging interest u/s 139(8).

Cases referred to :

1. *Ganesh Dass Sreeram vs. ITO*, 169 ITR 221 (Raj.)
2. *CIT vs. Builders Engineers Co.*, (1988) Taxation 91(3) 536 (Raj.); 175 ITR 371 (Raj.)

EDITOR'S NOTE

A similar decision has been taken by the Rajasthan High Court in *CIT vs. Abhor English Wine Merchants Association Beawar* in DBIT reference No. 74/87. This judgment is, therefore, not being published.

Full text of the Judgment is given below :

JUDGMENT

By this reference application under Sec. 256(1) of the Income-tax Act following question has referred for our opinion :-

> "Whether on the facts and in the circumstances of the case, where there was no tax payable by the firm on ultimate assessment, the Tribunal was justified in holding that interest u/s 139(8) of the I.T. Act, 1961 is not chargeable."

The assessee derives income from contract works. There are various defects and irregularities in the maintenance of the books of accounts, finally the proviso to Sec. 144 was attracted and income was assessed at a figure Rs. 82,353/- and the tax was assessed at a figure Rs. 4,687/-. The assessee has paid more tax and advance tax ultimately he got refund of Rs. 10,393. Learned counsel for assessee Shri Ranka submitted that this issue is squarely covered by the decision of their lordship in the case of *Ganesh Dass Sree Ram vs. ITO* (169 ITR 221) and also by the decision of this court in the case of *CIT vs. Builders Engineers* Co. (175 ITR 371). Wherein the decision of their lordship has also been considered and ultimately held that when the tax paid more than assessed tax no penalty under Sec. 271(1)(a)(i)(b) can be imposed.

Considering the above referred decisions we answer the question against the Revenue and in favour of assessee holding that no interest can be imposed in cases where the tax assessed is less than tax paid by assessee.

(1995) 126 Taxation 320 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Justice Y.R. Meena & Hon'ble Mr. Justice V.K. Singhal)

D.B.I.T. Reference No. 33 of 1983

Commissioner of Income-tax

vs.

The Mahindra & Company

For the Appellant	:	**G.S. Bafna**
For the Respondent	:	**Anant Kasliwal**
Decided on	:	20.1.1995

POWERS OF IAC/DC — Assessing Officer completing assessment

u/s 143(3) — Profit arising out of amalgamation of 'E' Company with 'V' Company not taxed — Levying tax on capital gains and income from rent — Assessee filing appeal — Appellate authority issuing directions to Assessing Officer to recompute capital gains — Assessment reframed — Assessing Officer sending order to IAC for direction u/s 144(A) — IAC directing surplus arising from amalgamation to be taxed — Held, matter of taxability of surplus already decided in original assessment — Assessing Officer cannot travel beyond the directions issued by appellate authority — Power of IAC u/s 144(A) not to extend jurisdiction of ITO — Such powers only meant for guidance — Direction of the IAC invalid.

Income-tax Act, 1961 — Section 144(A).

FACTS

Assessment for the period 31.12.1971 was completed by ITO u/s 143(3). The assessee claimed deduction u/s 47(vi) being the profit arising out of amalgamation of 'E' Company with 'V' Company. ITO accepted the claim of the assessee who brought to tax other income such as capital gain and income from rent. The assessee challenged the assessment in appeal and the AAC set aside the assessment for the purpose of recomputing capital gains. The ITO reframed the assessment and referred the same to the IAC u/s 144(A). A direction was given by the IAC that the profit arising out of amalgamation was liable to tax. This direction was challenged before the Tribunal and the Tribunal held that the direction given by the IAC was not valid in law. Being aggrieved, the revenue sought reference before the High Court.

DECISION

The Hon'ble High Court held that initially the claim was accepted by the ITO and the assessee challenged the liability with regard to capital gain and rental income. The AAC has given specific direction that the capital gain and rental income is to be recomputed. The ITO was bound by the decision of the AAC and his jurisdiction does not extend beyond recomputation of income from these sources. The power which has been given to the IAC u/s 144(A) cannot be exercised so as to extend the jurisdiction of the ITO. The power u/s 144(A) could not be invoked for extending the jurisdiction of the ITO which is limited to the extent of directions given by the AAC. The reference was decided against the revenue.

Cases referred to:

1. *Rambilas Chandram vs. CIT* (1985) 156 ITR 344 (Raj.)
2. *Surrendra Overseas Ltd. vs. CIT* (1979) 120 ITR 872 (Cal.)
3. *ITO vs. Ryam Sugar Co. Ltd.* (1976) 105 ITR 819 (Cal.)
4. *CIT vs. Fundilal Likhabchand* (1994) 1 Tax World 353

5. *Cawnpore Chemical Works Pvt. Ltd. vs. CIT* (1992) 197 ITR 296 (All.)
6. *CIT vs. Kamla Town Trust* (1992) 107 Taxation 2 (All.); (1992) 198 ITR 191

Full text of the Judgment is given below :

JUDGMENT

(V.K. Singhal, J.)

The Income-tax Appellate Tribunal has referred the following questions of law arising out of its order dated 10th Sept., 1981 in respect of assessment year 1972-73 u/s 256(1) of the Income-tax Act:-

"1. Whether on the facts and in the circumstances of the case the Tribunal was justified in upholding the finding of the CIT (Appeals) that provisions of section 52(2) of the I.T. Act, 1961 could not be invoked in this case and in deleting the addition made on this account ?

2. Whether on the facts and in the circumstances of the case the Tribunal was justified in upholding the order of the CIT (Appeals) deleting the addition of Rs. 4,29,593/- made by the ITO on account of profit on amalgamation of the companies M/s. Eastern Trading Syndicate, Jaipur and Shree Vijay Laxmi Trading Ltd., Pali Marwar, with the assessee company ?"

The brief facts of the case are that the assessment of the assessee in respect of the period ending on 31st Dec., 1971 was completed by the ITO u/s 143(3) of the Act and deduction u/s 47(vi) was claimed for a sum of Rs. 4,25,415/- which was the profit arising out of amalgamation of Eastern Trading Syndicate Private Ltd. with Shree Vijay Laxmi Trading Company Ltd. The Income-tax Officer was of the view that this surplus which has been claimed u/s 47(vi) of the Act is allowable and the claim appears to be proper. Besides allowing this item as not liable to tax the tax was levied in respect of different sources of income including the tax on capital gain and income from rent etc.

The assessee has challenged the liability of the capital gains and the rental income which was determined by the ITO before the Appellate Assistant Commissioner. The AAC set aside the assessment order for the purpose of recomputing the capital gains after affording the proper opportunity to the assessee and for the purpose of recomputing the rental income of the property known as 4-Fairlie Place, Calcutta. In respect of other grounds of appeal, relief of Rs. 445/- was given to the assessee. In pursuance of the direction given by the AAC, the ITO framed the assessment order and referred the same to the Inspecting Assistant Commissioner u/s 144(A) of the Income-tax Act. The assessee was given the opportunity and after

hearing the assessee, a direction was given by the Inspecting Assistant Commissioner that the profit arising out of amalgamation is liable to tax. The present controversy is only with regard to this addition which was made by the ITO on the directions being given by the IAC as to whether IAC could have given such a direction u/s 144(A) in respect of a source of income which was considered by him as exempt and not liable to tax in the original assessment order and for which no appeal was filed by the assessee and the directions by the Appellate Authority were only in respect of capital gains and income from rent.

Mr. Bafna has relied the decision of this Court in the case of *Rambilas Chandram vs. CIT* (1985) 156 ITR 344 wherein it was observed that where a case is sent back to the ITO without any restrictions, then the ITO can make additions of such source of the income of the assessee in the first assessment, he can make such addition in the fresh order of assessment.

Learned counsel for the assessee had relied the decision of (1979) 120 ITR 872 in the case of *Surrendra Overseas Ltd. vs. CIT* wherein the Calcutta High Court has observed that the ITO has no jurisdiction to consider on question which was not connected or covered or related to any grounds of appeal. If the IAC has set aside the assessment with direction to the ITO, the ITO has no jurisdiction to conduct an enquiry beyond the said direction and make a fresh assessment without reference to the earlier assessment. Reliance has also been placed on the decision of Calcutta High Court in *ITO vs. Ryam Sugar Co. Ltd.* (1976) 105 ITR 819 wherein the mistake committed in the original assessment order was tried to be rectified while giving affect to the appeal order and the Calcutta High Court was of the view that such correction could not be made. Reliance has also been placed in the case of *CIT vs. Fundilal Likhabchand* (1994) 1 Tax World 353, wherein, it was held that where the AAC has only set aside the assessment then a fresh assessment has to be made in accordance with the directions given by the appellate authority and the ITO is bound by those directions.

The decision of the Allahabad High Court in the case of *Cawnpore Chemical Works Pvt. Ltd. vs. CIT* (1992) 197 ITR 296 has also been relied to show that where the order of the AAC is specific, it is not open to the ITO to conduct a fresh enquiry beyond the said directions and to proceed to make a fresh assessment without any reference to the earlier assessment.

The decision in the case of *CIT vs. Kamla Town Trust* (1992) 198 ITR 191 has been relied on the proposition that even if an erroneous decision given it operates as *res judicata* between the parties and the ITO cannot travel beyond the directions and recompute the income of the assessee.

We have considered over the matter. From the perusal of the record of the assessee, it is evident that initially the question of claiming the deduction u/s 47 (vi) of the Income-tax Act was made by the assessee in respect of

surplus which has arisen on account of amalgamation between the Eastern Trading Syndicate Private Ltd. and Shree Vijay Laxmi Trading Ltd. The order of ITO has become final and was not challenged either by the assessee or by the revenue. Even no steps were taken u/s 263 of the Income-tax Act for cancellation of the assessment order on this point. The assessee has challenged the liability with regard to capital gains and rental income besides other income which does not include the income from profit on account of amalgamation from the two companies. The AAC has given specific direction in this case that the capital gains and rental income is to be recomputed. While giving affect to the order of AAC, the ITO was bound by the direction given by the AAC and his jurisdiction does not extend beyond recomputation of income from these two sources. The power which has been given to the IAC u/s 144(A) cannot be exercised so as to exten the jurisdiction of the ITO. The power u/s 144(A) is meant only for the guidance of the ITO and in a fresh assessment, the IAC may be justified in giving the direction to the ITO for making assessment in respect of any source of income which has not even been considered by the ITO. In a case where the matter has travelled before the appellate authority may be the AAC/CIT (Appeals) or the Income-tax Appellate Tribunal, the ITO is bound by the direction given by such authority. The power u/s 144(A) could not be invoked for extending the jurisdiction of the ITO which is limited to the extent of the directions being given by such an appellate authority. The IAC cannot annul or extend the scope of the order of the appellate authority. If this interpretation is taken that the IAC has the power to extend the jurisdiction of ITO, the result would be that in a particular case even the order passed by the ITAT on a particular point may be considered by the IAC on being referred by the ITO and directions contrary to the ITAT could be given in such a case. This is not intended even by the legislature and as such the only reasonable conclusion which can be arrived in the facts and circumstances of the case or which could be taken is that the jurisdiction of the ITO as well as the IAC in respect of matter where the assessment order has been set aside by the appellate authority is limited to the extent of the directions being given by such an authority. The jurisdiction of IAC is co-terminus the jurisdiction of ITO and IAC cannot exercise jurisdiction on matters in which ITO has jurisdiction. In respect of additions being made on account of capital gains or rental income directions could have been given but such directions cannot be given in respect of any other sources of income. In this case another important fact which has to be taken note of is that initially while framing assessment u/s 143(3), ITO has already considered the said claim and allowed it by way deduction. Such an order even if is illegal then the proper remedy for the revenue was to get it cancelled in the proceeding u/s 263 and not to cover that point in the proceeding u/s 143(3) read with section 250 of the Income-tax Act. In these circumstances, we are of the view that the

Income-tax Appellate Tribunal was justified in holding that the scope of assessment made by the Income-tax Officer in pursuance of direction issued u/s 250 of the Income-tax Act by the AAC was limited and the ITO was not competent to tax a sum of Rs. 4,29,593/- when at the time of original assessment, the same was not subject matter of appeal. In view of this position of law, we answer the first question in favour of the assessee and against the revenue. The Tribunal was justified in upholding the finding of the CIT (Appeals) that provisions of section 52 of the I.T. Act, 1961 could not be invoked in this case and in deleting the addition made on this account. There is no necessity to answer the second question. Accordingly, the reference is answered in favour of the assessee and against the revenue.

(1995) 126 Taxation 325 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Justice Y.R. Meena & Hon'ble Mr. Justice V.K. Singhal)

D.B.I.T. Reference No. 33 of 1986

Kushal Chand Sharma

vs.

Commissioner of Wealth-tax

For the Appellant	:	**T.C. Jain**
For the Respondent	:	**G.S. Bafna**
Decided on	:	12.1.1995

HUF — Assessee filing return in the status of HUF — Only wife having taxable income — Revenue taxing the assessee as specified HUF — Assessee claiming wife of karta not a co-parcener — Rates applicable as to a non-specified HUF — Held, the word used in the Schedule I provides taxing of HUF as specified where at least one member has taxable wealth — The lady not a co-parcener but all the same member of HUF — Liable to be taxed as specified HUF.

Wealth-tax Act, 1957 — Schedule I, Part I.

FACTS

The assessee filed wealth-tax return in the status of HUF. While the assessment was completed the WTO applied the rates applicable to specified HUF - The assessee pleaded that since the wife of karta is not a co-parcener who can claim partition of HUF, therefore, it will be considered as non-specified HUF. The Tribunal, however, decided in favour of the revenue.

DECISION

The Hon'ble Court held that Schedule I of the Wealth-tax Act provides the

rates of tax and in Part I of the Schedule I the rate of tax in respect of individual or HUF have been prescribed. Item 2 of Part I prescribes the rate of tax in respect of HUF which has at least one member whose net wealth is assessable under the Wealth-tax Act. The use of the word 'member' in the Schedule of Wealth-tax Act and the provisions of the Hindu law make it clear that wife is a member of the family and not a co-parcener. There is no requirement under law that the member should be a co-parcener. The Schedule of Wealth-tax Act has not required that the member should be a co-parcener. The concept of Hindu law of a co-parcenery cannot be invoked. The reference was decided against the assessee.

Cases referred to :

1. *Kalyanji Vithaldas vs. CIT* (1937) 5 ITR 90
2. *Gowli Buddanna vs. CIT* (1966) 60 ITR 293 (SC)
3. *N.V. Narendra Nath vs. CWT* (1969) 74 ITR 190
4. *Surjit Lal Chhabda vs. CIT* (1975) 101 ITR 776

Full text of the Judgment is given below :

JUDGMENT

The assessee has prayed before the Income-tax Appellate Tribunal for making reference to this court in respect of two questions, but only one question was referred in respect of assessment year 1976-77 u/s 27(1) of the Wealth-tax Act, which is as under :-

> "Whether on the facts and in the circumstances of the case the correct status of the assessee was specified HUF or otherwise."

The return of wealth was filed by the assessee in respect of the period ending on Deewali 1975 on 1.7.1976 showing the status as HUF. The Wealth-tax Officer determined the net wealth-tax and charged the tax which was applicable to the specified HUF. In appeal before the CIT (Appeals) it was found that since no reasons have been given in the assessment order, therefore, the matter should be examined again by the Wealth-tax Officer as to why the status of specified HUF is taken. The assessee against the order of the CIT (A) approached the Income-tax Appellate Tribunal by way of second appeal and contended that the only member of HUF having taxable wealth is the wife of Karta and since the wife is not a co-parcener who can claim partition of HUF, therefore, it should be considered to be non-specified HUF. The Income-tax Appellate Tribunal observed that there is no difference between the term Joint Hindu Family which is used in the Hindu Law and undivided family which is used in the Income-tax Act and Wealth-tax Act but have used the word 'member' instead of 'co-parcener' and wife being the member of HUF, the status of the assessee has to be treated as that of specified.

We have considered over the matter. Wife is not a co-parcener under Hindu

Law and is entitled to maintenance out of husband's property and has to that extent an interest in his property. She cannot demand partition but, if a partition takes place between her husband and sons she is entitled to receive share equal to that of a son.

Co-parcenery is narrower than Joint Family. A person who acquires by birth an interest in joint or co-parcenery property is a co-parcener. Joint Hindu Family constituting co-parcenery is required to have a common male ancestor with lenient descendant in the main line whereas a Joint Hindu Family consists of all persons leniently descendant from a common ancestor and includes their wife and unmarried daughters.

In *Kalyanji Vithaldas vs. CIT* (1937-5 ITR 90) the Privy Council has made a distinction between co-parcenery and a Hindu Undivided Family and it was held that female can be a member of Hindu Undivided Family. In this case Moolji owned the property as a separate property which was gifted by him to his sons Kanji and Sewdas who had no sons. It was further held that the assessment has to be made as an individual till a son is born. In *Gowli Buddanna vs. CIT* (1966-60 ITR 293) it was held by the Apex Court that a single male co-parcener living with his mother and two sisters can constitute a Hindu Undivided Family. In this case the property was ancestral in the hand of father and after his death devolved by survivorship on the son and he was the only male co-parcener. The reduction of number of co-parcener was considered not a relevant factor. In *N.V. Narendra Nath vs. CWT* (1969 74 ITR 190) the principle of *Gowli Buddanna's* came were followed and this was also a case of single co-parcener with his wife and two daughters, and, it was held that a joint family can consist of single male member and his wife and daughters, and there is nothing in the scheme of the Wealth-tax Act to suggest that the Hindu Undivided Family has an assessable unit must consist of at least two male members. In *Surjit Lal Chhabda vs. CIT* (1975 101 ITR 776), the assessee has no son and it was found that the property was not asset of a pre-existing joint family of which the assessee was a member and it became an item of Joint Family for the first time when the assessee threw his separate property into the family hotchpot. In respect of his own separate property which was so thrown of which the assessee was full owner, it was held that since he had no son at that point of time when the property was converted as Joint Family Property, the income of such property has to be considered as the income of the individual and not of Hindu Undivided Family. It was observed by Chandrachud, J.:

> "the joint Hindu family is thus a larger body consisting of a group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption. The fundamental principle of the Hindu Joint Family is the sapindaship. Without that it is impossible to form a joint Hindu family. It is the family relation, the sapinda relation which

distinguishes the joint family and is of its very essence ... The appellant's wife became his sapinda on her marriage with him. The daughter too, on her birth, became a sapinda and until she leaves the family by marriage, the tie of sapindaship will bind her to the family of her birth."

Schedule I of the Wealth-tax Act provides the rates of tax and in part I of the said schedule, the rate of tax in respect of individual or Hindu undivided family have been prescribed. Item 2 of part I prescribes the rate of tax in respect of Hindu undivided family which has at least one member whose net wealth is assessable under the Wealth-tax Act.

The use of the word 'member' in the schedule of Wealth-tax Act, in the light of the decision of the Apex Court and the provisions of Hindu Law make it clear that the wife is a member of the family and is not a co-parcener. There is no requirement under law that the member should be a co-parcener. The Apex Court itself has considered wife as a member and since the schedule of the Wealth-tax Act has not required that the member should be a co-parcener, the concept of Hindu Law of a co-parcenery cannot be invoked.

It is not in dispute that the wealth of the wife of the Karta is a taxable wealth and she is also a member of the family. In these circumstances, we are of the view that the Income-tax Appellate Tribunal was justified in coming to the conclusion that the correct status of the assessee was specified HUF.

Consequently, the reference is answered in favour of the revenue and against the assessee.

(1995) 126 Taxation 328 (P&H)

IN THE HIGH COURT OF PUNJAB & HARYANA

(Before Hon'ble Mrs. Justice H.K. Sandhu)

Criminal Misc. A. No. 8085-A of 1992

M/s Amrit Lal & Co. & Others

vs.

Income-tax Officer, Ward 1, Ferozpur

For the Appellant	:	**S.M. Lal Arora**
For the Respondent	:	**R.P. Sawhney**
Decided on	:	1.2.1994

PROSECUTION — Assessing Officer finding assessee accepting cash loans of Rs. 17,000/- on 24.6.1988, 40,000/- on 6.9.1988, 12,000/- on 1.10.1988 and 10,000/- on 13.5.1988 — Prosecution proceedings for offences u/s 276-DD read with Section 276B launched — Petitioners approaching High Court for quashing proceedings — Main ground taken after amendment w.e.f.

1.4.1989, violations of provisions of Section 269-T no more penal — Held, offences committed prior to amendment — Penal provisions existent when offences committed — Prosecution rightly invoked.

Income-tax Act, 1961 — Sections 269-T, 276-DD and 278-B.

FACTS

Income-tax Officer, Ward No. 1, Ferozpur filed a complaint against M/s Amrit Lal & Company through its partners for an offence u/s 276-DD read with section 278B of the Income-tax Act. The complaint was filed on the allegations that the petitioners submitted their income-tax return on 15.3.1990 at Rs. 52,050/- and the assessment was completed at a net taxable income of Rs. 54,050/- vide order dated 30.10.1990. During the course of assessment proceedings the then ITO found that the assessees had accepted Rs. 17,000/- on 24.6.1988, Rs. 40,000/- on 6.9.1988, Rs. 12,000/- on 1.10.1988 in cash from Shri Milkhi Ram son of Kalu Ram and they accepted Rs. 10,000/- in cash from Shri Milkhi Ram son of Bihari Lal on 13.5.1988, otherwise than by account payee cheque or account payee drafts in contravention of the provisions of Section 269-SS of the Income-tax Act, 1961. The present petition has been filed by the firm through its partners u/s 482 Cr. P.C. for quashing the complaint referred above.

DECISION

A perusal of the complaint as filed by the respondent in the Court of Chief Judicial Magistrate, Ferozpur shows that the complaint was filed u/s 276-DD read with Section 276B of the Income-tax Act, 1961 and the petitioners were alleged to have contravened the provisions of Section 269-SS of the Income-tax Act by accepting various amounts otherwise than by account payee cheques or account payee drafts. Later on this section was amended with effect from 1.4.1989 and the word '10' was substituted by '20'. It is thus evident that in the year 1988 the petitioners could not accept or receive any amount beyond a sum of Rs. 10,000/- otherwise than by account payee cheque or account payee bank draft. As per averments made in the complaint they had received an amount of Rs. 17,000/- on 24.6.1988, Rs. 40,000/- on 6.9.1988 and Rs. 12,000/- on 1-10-1988 in cash and *prima facie* they were liable for contravention of the provisions of the above referred section. It is correct that Section 276-DD was omitted with effect from 1-4-1989, but the contravention was alleged to have been made by the petitioners in the year 1988. *Prima facie* it was open for the ITO to launch prosecution in respect of acts or omissions committed during the period the provisions of repeal or unamended sections were operative. Section 276-DD was in operation at the time the payments were alleged to have been accepted by the petitioners and subsequent repeal of the section will not exonerate the petitioners of the violation, if any,

committed by them. The Hon'ble Court, therefore, held that the petition is without any merit and, therefore, dismissed.

Full text of the Judgment is given below :

JUDGMENT

(Harmohinder Kaur Sandhu, J.)

M/s Amrit Lal and Company, Guru Harsahai, which is a registered firm constituted by four partners i.e. petitioners No. 2 to 5 carried on its business at Guru Harsahai. Income-tax Officer, Ward No. 1, Ferozepur, filed a complaint against M/s Amrit Lal and Company through its partners for an offence under Section 276-DD read with Section 278-B of the Income-tax Act. The complaint was filed on the allegations that the petitioners submitted their income tax return on 15-3-1990 at Rs. 52,050/- and the assessment was completed at a net taxable income of Rs. 54,050/- vide order dated 30-10-1990. During the course of assessment proceedings the then Income-tax Officer had accepted Rs. 17,000/- on 24-6-1988, Rs. 40,000/- on 6-9-1988, Rs. 12,000/- on 1-10-1988, in cash from Shri Milkhi Ram Son of Kalu Ram and they accepted Rs. 10,000/- in cash from Shri Milhi Ram Son of Bihari Lal on 13-5-1988, otherwise than by account payee cheque or account payee drafts in contravention of the provisions of Section 269-SS of the Income-tax Act, 1961. Petitioners No. 2 and 5 were partners of the firm and were directly connected and were in charge of and responsible to the firm in the conduct of its day-to-day business. So they were liable for the alleged offence.

The present petition has been filed by the firm through its partners under Section 482 Cr.P.C. for quashing the complain referred above Annexure P/1 and other proceedings initiated on the basis of the same pending in the Court of Chief Judicial Magistrate, Ferozepur. It was alleged that after April 1, 1989 violation of provisions of Section 269-I was no more penal but the Income-tax Officer by misusing his power as a public servant filed the complaint and the learned trial Court without applying its mind to this aspect of the case summoned them which was clearly a misuse of the process of the Court. It was further alleged that partnership deed Annexure P/2 made it abundantly clear that petitioners No. 3 to 5 were sleeping partners being ladies and they had no concern with the conduct of the business of the firm. The Income-tax return was neither signed nor submitted by them. Verification of the return was signed by Amrit Lal, petitioner, yet they were wrongly assigned as accused.

In the written statement filed by the respondent the averments made in the petition were denied and it was alleged that although verification of the return was signed by Amrit Lal, yet petitioners No. 3 to 5 were responsible for carrying on business of the firm. It was further maintained that although Sections 276-DD and 276-E were omitted by Director Tax Laws (Amendment) Act, 1987 yet the violations of the provisions prior to

the date of omission remained penal and the petitioners were *prima facie* liable for the offence for which they were summoned.

I have heard the learned counsel for the parties and have perused the record.

A perusal of the complaint as filed by the respondent in the court of Chief Judicial Magistrate, Ferozepur shows that the complaint was filed under Section 276-DD read with Section 276-B of the Income-tax Act, 1961 (Assessment Year 1989-90) and the petitioners were alleged to have contravened the provisions of Section 269-SS of the Income-tax Act by accepting various amounts otherwise than by account payee cheque or account payee drafts. The copy of the complaint as attached with the present petition Annexure P/1 was not a correct copy as the complaint here was shown to have been filed under Section 276-E. U/s 269-SS no person could take or accept from any other person any loan or deposit otherwise than by an account payee cheque or account payee bank draft after the 30th day of June 1984, if —

(a) The amount of such loan or deposit or the aggregate amount of such loan or deposit; or

(b) On the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositer is remaining unpaid (whether repayment has fallen due or not) the amount or the aggregate amount remaining unpaid; or

(c) The amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b) is Rs. 10,000/- or more.

Later on this section was amended with effect from 1-4-1989 and the word '10' was substituted by '20'. It is thus evident that in the year 1988 the petitioner could not accept or receive any amount beyond a sum of Rs. 10,000/- otherwise than by account payee cheque or account payee bank draft. As per averments made in the complaint they had received an amount of Rs. 17,000/- on 24-6-1988, Rs. 40,000/- on 6-9-1988 and Rs. 12,000/- on 1-10-1988 in cash and *prima-facie* they were liable for contravention of the provisions of the above referred section.

It was argued on behalf of the petitioners that the contraventions of the provisions of Section 269-SS were punishable under Section 276-BB, but that Section was omitted with effect from 1-4-1989 and at the time when the assessment return was submitted by the petitioners, the violation of the provisions was no longer penal and the complaint was filed by the Income-tax Officer by misusing his powers. This contention of the learned counsel, however, does not hold good. It is correct that section 276-DD was omitted with effect from 1st April, 1989, but the contravention was alleged to have been made by the petitioners in the year 1988. Unless a different intention appears the repeal does not affect *inter alia* any

investigation, legal proceedings or remedy in respect of any such right privilege, obligation, liability, penalty etc. *Prima-facie* it was open for the Income-tax Officer to launch prosecution in respect of acts or omissions committed during the period the provisions of repeal or unamended sections were operative. Section 276-DD was in operation at the time the payments were alleged to have been accepted by the petitioners and subsequent repeal of the section will not exonerate the petitioners of the violation, if any, committed by them.

It was next urged on behalf of the petitioners that as per terms of the partnership deed, petitioners No. 3 to 5 who were ladies were sleeping partners and they were not in charge of the conduct of the business of the firm. They had not submitted any return and they were only involved in the case. The complaint against them was liable to quashed on this ground alone. In support of his contention the learned, counsel relied on the case of *Murari Lal and others vs. Income-tax Officer, 'A' Ward, Hissar*. In this case the return of the petitioner firm was signed and verified by one partner who had also signed the statement of accounts. Subsequently it was found that there had been false entries in the accounts. Proceedings were, therefore, initiated under Section 276-C of the Income-tax Act. It was no-where alleged by the complainant that the three other partners apart from the one who had signed the statements of accounts were in charge of and responsible to the firm for the conduct of the business of the firm at the time of the alleged offence so it was held that no criminal liability could be fixed on them and the complaint as well as all the proceedings taken in consequence thereof against those persons were quashed. This authority is not applicable to the facts of the present case as in para No.6 of the complaint it is specifically mentioned that all the partners of the firm were directly connected and were in charge of and were responsible to the firm in the conduct of its business. So, it cannot be said that there are no averments to that effect. The question whether they were sleeping partners and they had nothing to do with the conduct of business of the firm is to be determined only after evidence is led to that effect. The allegations made in the complaint *prima-facie* make out a case against the petitioners. No ground for quashing the complaint is made out and I find that the petition is without any merit. The same is hereby dismissed.

(1995) 126 Taxation 333 (Guj.)

IN THE HIGH COURT OF GUJARAT

(Before Hon'ble Mr. Justice G.T. Nanavati & Hon'ble Mr. Justice S.M. Soni)

IT Reference No. 387 of 1980

Commissioner of Income-tax

vs.

Peas Industrial Engineers (P) Ltd.

For the Appellant : **B.J. Shelat**

For the Respondent : **D.A. Mehta, R.K. Patel and K. C. Patel**

Decided on : 31.3.1993

DEPRECIATION — Assessee entering into an agreement with a sister company to acquire their know-how and drawings for manufacturing certain products — Paying lump sum amount — Amount paid added to cost of machinery — Revenue holding the said amount not to be added to the cost of machinery for the purpose of depreciation — Held, technical know-how in the form of drawing and design and so also travelling expenses in connection with the same to be added for determining actual cost — Assessee entitled to depreciation on the total cost.

Income-tax Act, 1961 — Section 43(1).

FACTS

The assessee entered into an agreement on 3.6.1969 with Meetler's Sons Ltd. of Switzerland to make their know-how available for manufacturing certain products in India. For obtaining this know-how and the drawings, the assessee, in all, paid Rs. 1,08,000/- to the foreign company. The assessee had incurred travelling expenses amounting to Rs. 17,219/- in connection with the acquisition of this technical know-how and the drawings. During the A.Y. 1971-72, the said amounts were taken to the machinery account and were, thus, capitalised. It then claimed depreciation on the basis of the increased cost of the said assets. The Tribunal held that the assessee was entitled to capitalise the expenditure in the manner in which it did and that depreciation was allowable on this asset.

DECISION

The Hon'ble Court held that it cannot be disputed that the amount which was paid by the assessee for the purpose of acquiring technical know-how and drawings and the travelling expenses incurred by it were also for the purpose of bringing such assets into existence. The Tribunal was, therefore, right in holding that the travelling expenditure was required to be taken into consideration for determining the actual cost of the asset and that the assessee was entitled to depreciation thereof.

Cases referred to :

1. *CIT vs. Elecon Engg. Co. Ltd.* (1974) 96 ITR 672 (Guj.)
2. *CIT vs. Elecon Engg. Co. Ltd.* (1987) Taxation 86(2) 2 (SC); (1987) 166 ITR 66 (SC)
3. *CIT vs. Polychem Ltd.* (1975) 98 ITR 574 (Bom.)
4. *Challapalli Sugars Ltd. vs. CIT* (1975) 98 ITR 167 (SC)

Full text of the Judgment is given below :

JUDGMENT

(G.T. Nanavati, J.)

The facts necessary for answering this reference are that the assessee entered into an agreement on 3.6.1969 with Meetler's Sons Ltd. of Switzerland to make their know-how available for manufacturing certain products in India. For obtaining this know-how and the drawings, the assessee, in all, paid Rs. 1,08,000/- to the foreign company. The assessee had incurred travelling expenses amounting to Rs. 17,219/- in connection with the acquisition of this technical know-how and the drawings. All these expenses were incurred between 1963 and 1966. The assessee started manufacturing activity some time in the year 1968-69. Till the year relevant to the assessment year 1971-72, the assessee had shown these expenses as miscellaneous expenses in its balance sheet, but during the year 1971-72, the said amounts were taken to the machinery account and were, thus, capitalised. It then claimed depreciation on the basis of the increased cost of the said assets.

The ITO rejected that claim on the ground that the assessee could have capitalised those expenses when the same were incurred and it could not have done so in 1970-71 after the manufacturing activity had already started in the year 1968-69. This view was confirmed by the AAC.

The assessee preferred a second appeal to the Tribunal. Following the decision of this Court in *CIT vs. Elecon Engg. Co. Ltd.* (1974) 96 ITR 672, the Tribunal held that the assessee was entitled to capitalise the expenditure in the manner in which it did and that depreciation was allowable on this asset. The Tribunal also held that the travelling expenditure incurred by the assessee had to be taken into considetration for determining the actual cost of the asset and, therefore, for the purposes of considering the claim of depreciation, this travelling expenditure was also required to be taken into consideration. The Tribunal, therefore, allowed the appeal of the assessee on this point. The revenue then moved the Tribunal to refer the following two questions to this Court :

> "1. **Whether, on the facts and in the circumstances of the case, the assessee in entitled to depreciation on the expenditure of Rs. 1,08,000 incurred on technical know-how in the form of drawings and designs ?**

2. Whether, on the facts and in the circumstances of the case, the travelling expenditure of Rs. 17,219 had to be taken into consideration as far as the actual cost of the asset is concerned an the assessee is entitled to depreciation thereon ?"

As stated earlier, the Tribunal had, following the decision of this Court, held that the assessee is entitled to depreciation on the expenditure c Rs. 1,08,000 incurred on technical know-how in the form of drawings anc designs. The view taken by this Court was confirmed by the Supreme Court in *CIT vs. Elecon Engg. Co. Ltd.* (1987) 166 ITR 66. Therefore, followin the decision of the Supreme Court in *Elecon Engg. Co. Ltd.'s* case (supra), question No. 1 will have to be answered in the affirmative, i.e., against the revenue and in favour of the assessee.

As regards the includibility of the travelling expenditure, the Tribunal has relied upon the decision of the Bombay High Court in *CIT vs. Polychem Ltd.* (1975) 98 ITR 574. In that case, the Bombay High Court has helc that the expression 'actual cost' used in section 10(2)(vi) and 10(5) of the Indian Income-tax Act, 1922 (now sections 32 and 33 of the Income-tax Act, 1961) would include all expenditure incurred directly or indirectly on the machinery and that it would not be correct to treat the words 'actua cost' to mean the cost paid to the vendors of the machinery alone. It furthei held that the travelling expenses incurred by the technical personnel in connection with the inspection and placing of orders for plant and machiner and the expenses incurred for the visits for doing the design and preliminar engineering work for the installation of the plant can be regarded as directl and intimately connected with the installation of the machinery and woulc fall within the meaning of 'actual cost' incurred for acquiring a depreciable asset. What can be included in the actual cost is also made clear by the Supreme Court in *Challapalli Sugars Ltd. vs. CIT* (1975) 98 ITR 167 by observing that the accepted accountancy rule for determining the cos of fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition. It cannot be disputec that the amount which was paid by the assessee for the purpose of acquirin technical know-how and drawings and the travelling expenses incurred b it were also for the purpose of bringing such assets into existence. The Tribunal was, therefore, right in holding that the travelling expenditure was required to be taken into consideration for determining the actual cost c the asset and that the assessee was entitled to depreciation thereof.

For the reasons stated above, both the questions are answered in the affirmative, i.e., against the revenue and in favour of the assessee. No orde as to costs.

SUMMARY OF HIGH COURT CASES

(1995) 126 Taxation 336 (MP.)

IN THE HIGH COURT OF MADHYA PRADESH

(Before Hon'ble Mr. Justice R.D. Shukla &

Hon'ble Mr. Justice Deepak Verma)

M.C.C. No. 626 of 1994

Commissioner of Income-tax

vs.

Smt. Leelabai c/o Swastic Ginning Factory

For the Appellant	:	**Saxena**
For the Respondent	:	**S. Kanga**
Decided on	:	13-1-1995

REFERENCE — ITO adding value of ornaments as income of the assessee — Tribunal accepting ornaments received by the lady in marriage — Revenue seeking reference — Held, pure question of fact — No referable question of law arose.

Income-tax.Act, 1961 — Section 256(2).

FACTS & DECISION

The two ladies claimed that the ornaments were received from their relations during their marriage. Later on these ornaments were repaired and reprocessed and the same is their Stridhan. They belong to a rich family and keeping ornaments of 125 tolas by a family of good status is not very unnatural. Under these circumstances the Hon'ble Court held that the findings arrived at by the Tribunal were not perverse. This is finding of fact and no referable question of law arose. As the findings are based on facts, prayer for reference was rejected.

TAX REPORTS

(1995) 126 Taxation 337 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

(Before Hon'ble Mr. Justice M. Ranga Reddy)

Criminal Appeal No. 435 of 1993

Assistant Commissioner of Income-tax

vs.

Poorna Cine Theatre (P) Ltd. & Others

For the Appellant : **Spl. Prosecutor**

For the Respondent : **Man Mohan**

Decided on : 8.7.1994

PROSECUTION — Assessee filing return showing agricultural income and claiming loss on purchase of leasehold rights of a film — Assessing Officer holding no agricultural operation carried and also disallowing loss holding the same to be collusive — Prosecution started — Additions deleted by Tribunal — Held, the very basis of prosecution against concealment of income nullified — No offence committed as made out by revenue — Respondent rightly acquitted.

Income-tax Act, 1961 — Sections 276C and 277.

FACTS

The case against the respondent in brief was that the first respondent was the private limited company carrying on business in exhibition and distribution of films. Respondents 2 to 5 are its directors. The first respondent filed its return of income-tax for the A.Y. 1985-86 showing loss. In that return a sum of Rs. 1,60,000/- is shown as agricultural income as having incurred some loss on account of purchase of leasehold rights of a film by name "Monagadu Vastunnadu Jagratha". The Assessing Authority disallowed the income shown as agricultural income and ordered the same to be treated as taxable income on the ground that the company had not carried on any agricultural operations and that the lease and sub-lease are only in the nature of adventure in trade and in the absence of any cultivation, it cannot be characterised as agricultural operations. In respect of loss, the Assessing Authority observed that it was only intended to avoid incidence of tax being aware of the marketability and potentiality of the film in view of the realisations made by Gandhi Theatras (a sister concern) for the earlier period and the assessee thus would not have taken the same on lease for such higher amount. The assessee filed an appeal before the Tribunal while this criminal case was pending before the Special Court. That appeal was allowed.

DECISION

The very basis of prosecution namely that the respondent has wilfully concealed the income is nullified and that, therefore, no offence under sections 276C and 277 of the IT Act is made out and consequently the trial Court acquitted the accused. On perusal of the judgment of the trial Court, the Hon'ble Court found that the Special Judge had given cogent and convincing reasons for coming to that conclusion and there was no reason to interfere with the same. Hence, the appeal was dismissed.

Case referred to :

K.T.M.S. Mohd. & Anr. vs. UOI 1992 (2) Crimes 314

Full text of the Judgment is given below :

JUDGMENT

(M. Ranga Reddy, J.)

The Asstt. CIT, Circle-I, Vijayawada who was the complainant in C.C. No. 289/89 on the file of Special Judge for Economic Offences has filed this appeal against the judgment dt. 26th Aug., 1992 acquitting the respondents of offences under ss. 276C and 277 of the IT Act, 1961.

The case against the respondent in brief was that the first respondent was the private limited company carrying on business in exhibition and distribution of films. Respondents 2 to 5 are its directors. The first respondent filed its return of income-tax for the A.Y. 1985-86 showing loss. In that return filed by R-1 a sum of Rs. 1,60,000/- is shown as agricultural income as having incurred some loss on account of purchase of leasehold right of a film by name "Monagadu Vastunnadu Jagratha" from M/s Gandhi Theatres (P) Ltd. The Assessing Authority disallowed the income shown as agricultural income and ordered the same to be treated as taxable income on the ground that the company had not carried on any agricultural operations and that the lease and sub-lease are only in the nature of adventure in trade and in the absence of any cultivation, it cannot be characterised as agricultural operations. So, the claim for exemption that the income of Rs. 1,60,000 by sale of agricultural produce was not accepted and it was further observed that R-1 company has wilfully attempted to avoid tax on Rs. 1,60,000.

M/s Gandhi Theatres (P) Ltd. is a sister concern of the first respondent. It has purchased the lease-hold rights of the film for Rs. 1,00,000 from 1st April, 1983 to 1st Sept, 1989. R-1 took on sub-lease the rights from the Gandhi Theatres (P) Ltd., Vijayawada for Rs. 3,50,000 from 1st Dec., 1984 to 1st Sept., 1989 and on account of it R-1 is said to have sustained some loss and the same is shown in the returns filed by him. In respect of this, the Assessing Authority observed that it was only intended to avoid incidence of tax as otherwise R-1 being aware of the marketability and potentiality of the film in view of the realisations made by Gandhi Theatras

for the earlier period and the assessee thus would not have taken the same on lease for such higher amount. So, this was also added to the income. As against that assessment, R-1 filed an appeal before the CIT and that appeal was also dismissed. Then on the directions of the CIT, Visakhapatnam, the Asstt. CIT, Circle-I, Vijayawada filed a complaint against the respondent for offences under ss. 276C and 277 of IT Act before the Special Judge for Economic Offences.

The assessee filed an appeal before the Tribunal while this criminal case was pending before the Special Court. That appeal was allowed on 8th May, 1990, Ex. P-13 is the order of the Tribunal. The Tribunal deleted the penalty and stated that it cannot be construed as a device invented to reduce the tax. The Tribunal further found that there is no material to show that the accused has concealed the income. Subsequent to the disposal of the appeal by the Tribunal, this criminal case came up for trial. The learned Special Judge relying on a decision of the Supreme Court *K.T.M.S. Mohd. & Anr. vs. Union of India* (1992)(2) Crimes 314 found that the very basis of prosecution namely that the respondent has wilfully concealed the income is nullified and that, therefore, no offence under ss. 276C and 277 of the IT Act is made out and consequently acquitted the accused. In the decision referred to above, the case had ended in conviction of the assessee and by the time the appeal was filed, the Tribunal had disposed of the appeal against levying penalty. So, the Supreme Court held that the prosecution is not maintainable and acquitted the accused.

In view of the above citation, the learned Special Judge acquitted the accused. On perusal of the judgment of the trial Court, I find that the Special Judge has given cogent and convincing reasons for coming to that conclusion and I do not find any reason to interfere with the same. Hence, the appeal is dismissed.

(1995) 126 Taxation 339 (Bom.)

IN THE HIGH COURT OF BOMBAY

(Before Hon'ble Justice Mr. V.A. Mohta & Hon'ble Justice Mr. G.D. Patil)

IT Application No. 87 of 1981

Commissioner of Income-tax

vs.

Dr. R.G. Wani

For the Appellant	:	**P.N. Chandurkar and Smt. S.S. Wandile**
For the Respondent	:	**None**
Decided on	:	17-12-1991

REFERENCE TO HIGH COURT — Assessee claiming relief u/s 23 in respect of shops — Relief allowed by Tribunal — Reference

application refused by Tribunal — Held, pure question of law — Tribunal directed to refer the question.

Income-tax Act, 1961 — Sections 23 & 256.

FACTS

The benefit under the second proviso to sub-section (1) of section 23 of the I.T. Act was claimed by the assessee on the basis that it was a residential unit. The ITO did not grant that benefit. The AAC allowed the appeal of the assessee. The Tribunal confirmed the order passed by the AAC on the basis of a circular of the C.B.D.T. dated 19.3.1971 and the case of Tata Engineering & Locomotive Co. Ltd. vs. Gram Panchayat, AIR 1976 SC 2463.

DECISION

The Hon'ble Court held that in view of the language employed in section 23 and the relevant proviso, the above questions of law do arise out of the order of the Tribunal and hence, this application is allowed and rule made absolute.

Cases referred to :

Tata Engineering & Locomotive Co. Ltd. vs. Gram Panchayat (1976) AIR 1976 SC 2463.

Full text of the Judgment is given below :

JUDGMENT

(V.A. Mohta, J.)

This is an application by the Commissioner of Income-tax, Nagpur, under section 256(2) of the Income-tax Act, 1961, for a direction to the Tribunal to state the case and to refer the following two questions said to be of law for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in confirming the orders of the Appellate Assistant Commissioner holding that relief under section 23(1) is admissible in respect of five shops utilised for commercial purposes ?

(2) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in holding that the assessee was entitled to relief in respect of five shops envisaged by the proviso to section 23 of the Income-tax Act in view of the admitted fact that premises were not residential units ?"

The property known as Wani Market, is registered as a commercial complex in the municipal council and is used as shops.

The benefit under the second proviso to sub-section (1) of section 23 of the Income-tax Act was claimed by the assessee on the basis that it was

a residential unit. The Income-tax Officer did not grant that benefit. The Appellate Assistant Commissioner allowed the appeal of the assessee. The Tribunal confirmed the order passed by the Appellate Assistant Commissioner on the basis of a circular of the Central Board of Direct Taxes dated March 19, 1971, and the case of *Tata Engineering and Locomotive Co. Ltd. vs. Gram Panchayat,* AIR 1976 SC 2463.

In view of the language employed in section 23 and the relevant proviso, the above questions of law do arise out of the order of the Tribunal and, hence, this application is allowed and rule made absolute. No order as to costs.

(1995) 126 Taxation 341 (Bom.)

IN THE HIGH COURT OF BOMBAY

(Before Hon'ble Justice Dr. B.P. Saraf & Hon'ble Justice Mr. S.M. Jhunjhunwala')

IT Reference No. 139 of 1983

Commissioner of Income-tax

vs.

Lallubhai Jogibhai

For the Appellant	:	**G.S. Jetley with P.S. Jetley**
For the Respondent	:	**None**
Decided on	:	10-11-1994

REASSESSMENT — Notice issued within the time prescribed but served after the end of 31st March — Assessee claiming assessment barred by limitation — Held, reassessment not barred by limitation.

Income-tax Act, 1961 — Sections 148 & 149.

FACTS

The assessee is an individual. He was assessed under the I.T. Act for the A.Y. 1966-67. The assessment was reopened by the ITO by issue of a notice u/s 148 of the Act. The notice was issued on 29.3.75 but it was served on the assessee on 7.4.1975. The Tribunal held that the notice u/s 148 is not only to be issued but served within the period of limitation as laid down in section 149 of the Act. As in the instant case, as the notice was served on the assessee after the expiry of eight years, the order of reassessment was set aside by the Tribunal. Hence this reference at the instance of the Revenue.

DECISION

The Hon'ble Court held that in the instant case, the undisputed factual position is that notice u/s 148 was issued by the ITO within the period of limitation prescribed u/s 149 of the Act. There is also no controversy

about the fact that the order of reassessment was made only after service of notice on the assessee. The ratio of the decision in *R.K. Upadhyaya vs. Shanabhai P. Patel* (1987) 166 ITR 163 of the Supreme Court squarely applies to the present case. The ITO having issued the notice u/s 148 within limitation, the order of reassessment is valid. The Hon'ble Court was, therefore, of the clear opinion that the Tribunal was not justified in holding that the initiation of reassessment proceedings by the ITO was barred by limitation and setting aside the orders of the AAC and the ITO.

Case referred to:

R.K. Upadhyaya vs. Shanabhai P. Patel (1987) Taxation 86(2) 5 ; (1987) 166 ITR 163 (SC)

Full text of the Judgment is given below :

JUDGMENT

(Dr. B.P. Saraf, J.)

The following question of law has been referred by the Income-tax Appellate Tribunal under section 256(1) of the Income-tax Act, 1961 for the opinion of this court at the instance of the Revenue.

> "Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in setting aside the order of the Appellate Assistant Commissioner dated January 28, 1977, as also the order of the Income-tax Officer dated February 20, 1976, adding Rs. 55,000 to the total income of Rs. 30,000 as per the original assessment order?"

The facts of the case relevant for determination of the controversy are as follows :

The assessee is an individual. He was assessed under the Income-tax Act, 1961 ("the Act"), for the assessment year 1966-67. The assessment was reopened by the Income-tax Offier by issue of a notice under section 148 of the Act. The notice was issued on March 29, 1975, but it was served on the assessee on April 7, 1975. The Income-tax Officer completed the assessment in pursuance of the proceedings initiated by him under section 147 of the Act by the above notice and included a sum of Rs. 55,000 as unexplained investment to the amount of income of Rs. 30,000 which was assessed earlier in the original assessment. The order of reassessment was challenged before the Appellate Assistant Commissioner on the ground, *inter alia*, that though the notice under section 148 was issued within eight years from the end of the relevant assessment year, it was served after the expiry of the period of eight years and hence the proceedings were barred by limitation. The Appellate Assistant Commissioner did not accept the contention of the assessee and held that issue of notice under section 148 within the period of eight years was sufficient compliance with the requirement of section 147 read with section 149 of the Act. The assessee went in further appeal to the Income-tax Appellate Tribunal (the Tribunal). The

Tribunal held that the notice under section 148 is not only to be issued but served within the period of limitation as laid down in section 149 of the Act. As in the instant case, as the notice was served on the assessee after the expiry of eight years, the order of reassessment was set aside by the Tribunal. Hence, this reference at the instance of the Revenue.

Mr. G.S. Jetley, learned advocate, appearing for the Revenue, submits that section 149 simply lays down the time-limit for issue of notice under section 148. Once a notice is issued within the period specified therein, the initiation of proceedings would be valid and service of notice beyond the period of limitation would not invalidate the same. In support of this contention, reliance is placed on the decision of the Supreme Court in *R.K. Updadhyaya vs. Shanabhai P. Patel* (1987) 166 ITR 163.

We have considered the submission of Mr. Jetley. The controversy in this case seems to be covered by the decision of the Supreme Court referred to above. The Supreme Court in that case categorically held that a clear distinction has been made out under the Income-tax Act, 1961, between "issue of notice" and "service of notice". Section 149 prescribes the period of limitation. It prohibits issue of notice under section 148 after the expiry of the prescribed period of limitation. Section 148(1) provides for service of notice as a condition precedent for making an order of assessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested with the Income-tax Officer to proceed to reassess. The requirement of issue of notice is satisfied when a notice is actually issued. Section 148(1) deals with the making of the reassessment and mandated that reassessment shall not be made until there has been service. Under the Income-tax Act, 1961, service is not a condition precedent to conferment of jurisdiction on the Income-tax Officer to deal with the matter but it is a condition precedent to the making of the order of assessment.

In the instant case, the undisputed factual position is that notice under section 148 was issued by the Income-tax Officer within the period of limitation prescribed under section 149 of the Act. There is also no controversy about the fact that the order of reassessment was made only after service of notice on the assessee. The ratio of the decision in *R.K. Upadhyaya vs. Shanabhai P. Patel* (1987) 166 ITR 163 of the Supreme Court squarely applies to the present case. The Income-tax Officer having issued the notice under section 148 within limitation, the order of reassessment is valid. We are, therefore, of the clear opinion that the Tribunal was no justified in holding that the initiation of reassessment proceedings by the Income-tax Officer was barred by limitation and setting aside the orders of the Appellate Assistant Commissioner and the Income-tax Officer.

Having regard to the above discussion, we answer the question referred to us in the negative and in favour of the Revenue.

There shall be no order as to costs.

(1995) 126 Taxation 344 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Justice Mr. Ajoy Nath Ray)

Matter No. 2113 of 1993

Jogat Mohan Kapur

vs.

Wealth-tax Officer & Others

For the Appellant	:	**J.P. Khaitan**
For the Respondent	:	**Halder**
Decided on	:	22-4-1994

WEALTH-TAX — Reassessment — WTO issuing notice for computing value of land & building — Cost inflation index as applicable to capital gains applied in a reverse manner — WTO coming to a conclusion wealth understated — Starting reassessment proceedings — Held, reassessment on such basis not valid.

Wealth-tax Act, 1957 — Section 17.

Constitution of India — Article 226.

FACTS & DECISION

The point at issue in this matter is the result of the application of the Cost Inflation Index by the WTO for the purpose of his coming to the conclusion that wealth has escaped assessment by reason of assessment being made at too low a rate. The Hon'ble Court held that the Cost Inflation Index, as the name implies, is to be applied only to forward figures in time, that is, the inflation is to be calculated by appropriately inflating the cost of acquisition of the capital in accordance with the declared index. There is no warrant for reversing the operation of the Cost Inflation Index, and treating it in a reversed manner as a shrinkage index for the purpose of computing past land value. This method would lead to unfairness and glaring financial fallacies. Since it is case of reopening of the assessment, the burden is quite heavy on the Revenue to establish the factors that warrant the exercise of the power. The information that has to be the basis for action u/s 17(1)(b) should be legally admissible material and cannot be just a subjective inferential fact. In the absence of any material to indicate the percentage of fluctuation in the prices of the immovable properties, it will be an entirely guess work to deduct a few percentage from the subsequent year's valuation to arrive at the valuation for the previous years.

Case referred to:

CWT vs. S.P.C. Murthy (1991) 191 ITR 189 (Kar)

Full text of the Judgment is given below :

JUDGMENT

(Ajoy Nath Ray, J.)

The writ petitioner challenges the reopening of the wealth-tax assessments for the assessment years 1982-83 to 1991-92.

The wealth in question is a piece of immovable property situated at Greater Kailash, Part-II, New Delhi.

In the assessment year 1993-94, the assessee applied for a 230A clearance showing the intended sale price of the said property as Rs. 57.25 lakhs.

In the affidavit-in opposition from the respondent, it has been alleged that by reason of such declaration of price of sale of the property, the concerned office applied the Cost Inflation index, and working backwards, found that the value of the property would be much larger than what was assessed in the successive wealth-tax assessment years of the assesseee.

A chart in this respect as given in the affidavit-in-opposition is set out below:

Assessment Year	Cost Inflation Index	Value as per index (Rs.)	Assessed value (Rs.)
1982-83	100	25,67,265	1,50,00
1983-84	109	27,98,318	-do-
1984-85	116	29,78,026	-do-
1985-86	125	32,09,080	1,00,000
1986-87	133	34,14,461	1,50,000
1987-88	140	35,94,170	8,50,000
1988-89	150	38,50,896	11,00,000
1989-90	161	41,33,295	13,50,000
1990-91	172	44,15,695	15,00,000
1991-92	182	46,72,421	15,00,000
1992-93	199	51,08,856	Not yet assessed
1993-94	223	57,25,000	Not yet assessed

The writ petitioner has mentioned in the affidavit-in-reply that all the assessment years were concluded by due assessment upon furnishing of all due particulars by the assessee. In several years there were appeals. So far as the assessment years 1982-83 to 1984-85 and 1987-88 are concerned, those were concluded under section 16(3) of the Wealth-tax Act, 1957, and four years have run from such assesment. The figures of assessed value at the first level as well as upon appeal set out by the assessee in the following chart form in his affidavit-in-reply :

Assessment notice year	Estimated value as per return (Rs.)	Value assessed by the WTO (Rs.)	Value as per appellate order (Rs.)
1982-83	55,000	1,50,000	1,50,000

1983-84	55,000	1,50,000	1,50,000
1984-85	55,000	1,50,000	No appeal
1985-86	1,00,000	1,00,000	No appeal
1986-87	1,50,000	1,50,000	No appeal
1987-88	8,00,000	8,50,000	No appeal
1988-89	10,00,000	15,00,000	11,00,000
1989-90	10,00,000	15,00,000	13,50,000
1990-91	10,00,000	15,00,000	15,00,000
1991-92	15,00,000	15,00,000	No appeal

The point in issue in this matter is the result of the application of the Cost Inflation Index by the Wealth-tax Officer for the purpose of his coming to the conclusion that wealth has escaped assessment by reason of assessment being made at too low rate. I need not enter into the special issue of four years having run in respect of four assessment years and the disclosures by the assessee-writ petitioner being in no manner incomplete or untrue. I need not enter into this issue of limitation in regard to four years because, in my opinion, the matter is to be disposed of on a more substantial and comprehensive basis.

The Cost Inflation Index is designed for computaion of gain in capital upon which capital gains tax is to be computed. Under section 48, *Explanation (v)*, of the Income-tax Act, 1961, Cost Inflation Index is explained to be as follows :

"(v) 'Cost Inflation Index' for any year means such index as the Central Government may, having regard to 75 per cent of the average rise in the Consumer Price Index for urban non-manual employees for that year, by notification in the Official Gazette, specify in this behalf."

On August 5, 1992, Notification No. S.O 595 (E) (see) [1992] 197 ITR (St.) 24), declared the following Cost Inflation Indices for the mentioned financial years :

"Notification No. S.O. 595(E), dated 5th August, 1992

In exercise of the powers conferred by clause (v) of the *Explanation* to section 48 of the Incoem-tax Act, 1961 (43 of 1961), the Central Government, having regard to seventy-five per cent of the average rise in the Consumer Price Index for urban non-manual employees, hereby specifies the Cost Inflation Index as mentioned in column (3) of the Table below for the financial year mentioned in the corresponding entry in column (2) of the said Table :

TABLE

Serial No.	Financial Year	Cost Inflation Index
1.	1981-82	100
2.	1982-83	109

3.	1983-84	116
4.	1984-85	125
5.	1985-86	133
6.	1986-87	140
7.	1987-88	150
8.	1988-89	161
9.	1989-90	172
10.	1990-91	182
11.	1991-92	199
12.	1992-93	223"

In my opinion, Cost Inflation Index, as the name implies, is to be applied only to forward figures in time, that is, the inflation is to be calculated by appropriately inflating the cost of acquisition of the capital in accordance with the declared index. There is no warrant for reversing the operation of the Cost Inflation Index, and treating it in a reversed manner as a shrinkage index for the purpose of computing past land value. This method would lead to unfairness and glaring financial fallacies.

Land does not necessarily appreciate in the same manner as does the price index of urban non-manual employees. The two items are ordinarily quite separate. To apply the Consumer Price Index in a reversed manner for computing the value of the land of earlier years and to reopen wealth-tax assessment on that basis is proceeding irrationally and on the basis of a totally extraneous factor. Application of the Cost Inflation Index in such a reversed manner for the computaion of land value is arbitrary, unreasonable and in violation of the mandates of article 14 of the Constitution of India.

On behalf of the petitioner, a decision of the Karnataka High Court in *CWT vs. S.P.C. Murthy* [1991] 191 ITR 189 was relied upon. In that decision, the value of property was held to be subject to various factors for change in their value. Indeed, that is true for Bangalore (which was the city discussed in that case) and it is equally true for any other city. A host of factors might cause land value to drop or to rise. A mechanical application of the Cost Inflation Index as declared for capital gains tax in this context would be thoroughly unsustainable. Land valuation is not that simple a matter.

K. Shivashankar Bhat J., speaking for the Division Bench, observed as follows in the above case (at page 194) :

> "In the instant case, the reopening is done not just by applying the valuation of the property furnished by the valuer. The said valuation given by the valuer was with reference to a subsequent date. From this valuation, the Wealth-tax Officer deducted certain percentages to estimate the values as on the earlier valuation dates. There is absolutely no

material that the value of the property fluctuated only by 10 per cent or 20 per cent as the case may be; the percentage for deduction selected by the wealth-tax Officer was entirely on his own estimate and inference. It was not based on any expert opinion. It cannot be said that the value of the property was just about 20 per cent less than the subsequent year. This again depends upon the developmental activity that took place in the locality and various other unidentifiable factors. In a developed city like Bangalore, the price of the immovable property may shoot up year to year not by a few percentage only.

Since it is a case of reopening the assessment, the burden is quite heavy on the Revenue to establish the factors that warrant the exercise of the power. The information that has to be the basis for action under section 17(1)(b) should be legally admissible material and cannot be just a subjective inferential fact. In the absence of any material to indicate the percentage of fluctuation in the prices of the immovable properties, it will be an entirely guess work to deduct a few percentage from the subsequent year's valuation to arrive at the valuation for the previous years."

The ideas in the above passage are quite clear, in my respectful opinion, quite correct.

For the above reason, I am of the opinion that the reopening of wealth-tax assessments for the years in question has been vitiated by a mechanical and irrational application in the reverse manner of the factor of Cost Inflation Index in the instant case.

The writ application, accordingly, succeeds. There shall be rules absolute in terms of prayers (a), (b) and (c) and also a permanent injunction in terms of prayer (e) of the petition.

All parties and others concerned shall act on a xerox singed copy of this dictated order upon the usual undertakings.

(1995) 126 Taxation 348 (Guj.)

IN THE HIGH COURT OF GUJARAT

(Before Hon'ble Mr. Justice M.B. Shah &
Hon'ble Mr. Justice J.M. Panchal)

IT Reference No. 297 of 1981

Commissioner of Income-tax

vs.

Mehmoodmian A. Topiwala

For the Appellant	:	**R.D. Pathak**
For the Respondent	:	**M.R. Bhatt**
Decided on	:	30.12.1993

CLUBBING OF INCOME — Assessee owning certain properties jointly with his brother — Assessee gifting his 1/3rd share to two sons of his brother — On the same day assessee's brother transferring his 1/3rd share to assessee's wife — Assessee's wife selling the property and depositing the amount with the assessee — ITO including the interest paid to the wife in the assessment of assessee — Held, provisions of Section 64 applicable to such transfer — Amount rightly taxed in the hands of the assessee.

Income-tax Act, 1961 — Section 64.

FACTS

This reference relates to A.Y. 1974-75. The assessee owned land with his two brothers as joint owner. The assessee gifted his 1/3rd share in the land to two sons of one of his brothers. The assessee's brother on the same day transferred his 1/3rd share belonging to him to assessee's wife. The assessee's wife sold the land received by her as a gift. On sale, the amounts received by the wife were invested with her husband who paid interest to his wife. The said amount of interest was added u/s 64 of the Act in the income of the husband. The AAC, however, deleted the amount holding that provisions of Section 64 were not applicable and the Tribunal confirmed the order of the AAC. Being aggrieved, the revenue filed reference.

DECISION

The Hon'ble Court held that transfer of 1/3rd share in the land by assessee's brother in favour of assessee's wife was indirectly a transfer by the assessee as contemplated by Section 64(1)(iii) because the assessee had transferred the land to his brother's son and the said brother in his turn transferred his 1/3rd share in the same land to the wife of the assessee in order to get out of the legal liability. The Hon'ble Court, therefore, held that conditions as laid in Section 64(1)(iii) stood satisfied and, therefore, the ITO was justified in adding the amount of interest to the income of the assessee. The reference was decided in favour of the revenue.

Cases referred to :

1. *CIT vs. Mohmadmiya A. Topiwala* (1994) 119 Taxation 501 (Guj.); (1994) 207 ITR 711 (Guj.)
2. *CIT vs. Greaves Cotton & Co. Ltd.* (1968) 68 ITR 200 (SC)
3. *ICI (India) (P) Ltd. vs. CIT* (1972) 83 ITR 710 (SC)
4. *G. Venkataswami Naidu & Co. vs. CIT* (1959) 35 ITR 594 (SC)
5. *CIT vs. Rajasthan Mines Ltd.* (1970) 78 ITR 45 (SC)
6. *CIT vs. Prembhai Parekh* (1970) 77 ITR 27 (SC)
7. *CIT vs. Prahladrai Agarwala* (1989) Taxation 94 (2) 61 (SC) (1989) 177 ITR 398 (SC)

8. *CIT vs. Keshaval Lallubhai Patel* (1965) 55 ITR 637 (SC)

9. *Smt. Mohini Thapar vs. CIT* (1972) 83 ITR 208 (SC)

Full text of the Judgment is given below :

JUDGMENT

(J.M. Panchal, J.)

The following two questions of law have been referred to this Court for opinion by the Tribunal, Ahmedabad Bench 'B' under section 256 of the Income-tax Act, 1961 (the Act):

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that as the assessee had made gifts to his major nephews, the gifts made by the assessee's brother to his wife would not come within the mischief of section 64 of the Income-tax Act, 1961 ?

2. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal has been right in law in confirming the order of the AAC deleting the addition of Rs. 7,195 as income of the assessee under section 64 of the Income-tax Act, 1961?"

The assessee, i.e. Mehmoodmian A. Topiwala is being assessed in the status of an individual. This reference relates to the assessment year .1974-75. Three brothers, i.e. (1) Shri Abdullahmian A. Topiwala, (2) Shri Mohammed Husein A. Topiwala, and (3) Shri Mehmoodmian A. Topiwala were joint owners of a land admeasuring 7629 sq. yds. situated at Paldi in Ahmedabad.

The assessee gifted his one-third share in the land situated at Paldi, Ahmedabad, to two sons of Shri Abdullahmian A. Topiwala on 25.3.1966. On the same day, the assessee's brother, i.e. Shri Abdullahmian A. Topiwala transferred his one third share belonging to him in the said land to the assessee's wife Hafsabanu. The assessee's wife sold the land received by her as a gift from the assessee's elder brother. The sale of the land resulted in capital gains of Rs. 23,830 for the assessment year 1968-69 and Rs. 44,300 for the assessment year 1969-70. The amounts received by the wife of the assessee were invested by her with the assessee. The assessee had paid interest of Rs. 2,860 and Rs. 7,195 to his wife. While working out the income of the assessee for the assessment year 1974-75, the ITO added the aforesaid two amounts in the income of the assessee in view of the provisions of section 64 of the Act.

Feeling aggrieved, the assessee preferred an appeal before the AAC. The AAC noted that the ITO had not given any reason for applying the provisions of section 64 while adding Rs. 2,860 to the income of the assessee. The AAC referred to the past record and presumed that this interest might have been paid on Rs. 15,000 which Hafsabanu had received by cheque from the assessee's brother. He further found that the amount was not

transferred by the assessee to his wife but as gifted by the assessee's brother and, hence, section 64 had no application. In that view of the matter, the AAC deleted the addition of Rs. 2,860.

Relying on the decisions rendered in the case of the assessee in IT Appeal Nos. 68 of 1977-78 and 39 (Ahd) of 1976-77 for the assessment years 1968-69 and 1969-70, respectively. The AAC further held that the provisions of section 64 were not applicable to the facts of the present case and therefore, the ITO was not justified in adding the amount of Rs. 7,195 to the income of the assessee. In view of the said conclusions, the AAC allowed the appeal by the assessee.

Feeling aggrieved, the revenue preferred an appeal before the Tribunal. The Tribunal confirmed the order of the AAC and dismissed the appeal filed by the revenue.

Thereupon, the revenue moved an application requiring the Tribunal to refer the questions of law said to arise out of the order passed in IT Appeal No. 1360 (Ahd.) of 1979 for the opinion of the High Court. The Tribunal agreed that two questions of law arise for the opinion of the High Court of the said order and has, therefore, referred above quoted two questions for the opinion of the Court.

The question whether one-third share of the land at Paldi received by the assessee's wife Hafsabanu as gift from the assessee's brother Abdullahmian was an asset indirectly transferred to her by her husband assessee is concluded by the decision of this Court in the case of this very assessee, *CIT vs. Mohmadmiya A. Topiwala* (1994) 207 ITR 711 (Guj.) The Division Bench of this Court comprising G.T. Nanavati, J. (as he then was) and Y.B. Bhatt, J. has held that the transfer of one-third share in the land made by the assessee's wife was indirectly a transfer by the assessee as contemplated by section 64(1)(iii) because the assessee had transferred the land to his brother's sons and the said brother in his turn had transferred his one-third share in the same land to the wife of the assessee in order to get out of the legal liability.

In view of the above decision between the same parties, we are of the opinion that on the facts and in the circumstances of the case. The Tribunal was not right in law in holding that as the assessee had made gift to his major nephews, the gift made by the assessee's brother to his wife would not come within the mischief of section 64.

However, Mr. R.D. Pathak, the learned counsel for the assessee vehemently submitted that in the above mentioned reported case, the Tribunal had recorded a finding of fact was not accepted by the Court in reference made under section 256(1) though the said finding was not challenged by the revenue as a perverse finding and, therefore, the judgment rendered by his Court between the parties being without jurisdiction, the same should not be referred to and relied upon by his Court while answering question

No. 1 referred to this Court. It was submitted that in a reference made under section 256(1), the Court cannot disturb or go behind a finding of fact given by the Tribunal unless specific question necessary to challenge a finding of fact has been referred to the Court and, thus, the reported decision between the parties have been rendered against the well settled principle of law, it was without jurisdiction and the same should not be treated as a binding precedent by this Court in the present reference. In support of his submission, the learned counsel placed reliance on the decisions rendered by the Supreme Court in the cases of *CIT vs. Greave, Cotton & Co. Ltd.* (1968) 68 ITR 200 and *ICI (India) (P) Ltd. vs. CI'* (1972) 83 ITR 710.

We state that the contention raised by the learned counsel for the assessee is without substance because in this reference we have no jurisdiction to sit in appeal against the order passed by the Court has appreciated the contention raised by the assessee, particularly with regard to jurisdiction and has negatived it. The relevant paragraph which deals with the contention of jurisdiction raised by the learned counsel for the assessee in the case of Mohmadmiya A. Topiwala (supra) decided by this Court between the same parties is as under :

> "The Tribunal has proceeded on the basis that, in this case, there was no intimate connection between the two transferees, it was, therefore, submitted by the learned counsel for the assessee that this being a findin of fact, it is required to be accepted by this Court and, in a reference under section 256(1) of the Act, no different view can be taken by thi. Court. As pointed out by us, this finding has been recorded by the Tribunal after applying a wrong text. Therefore, it cannot be regarded as pure finding of fact. Moreover, a question challenging this findin is referred by the Tribunal to this Court for its opinion. The question is whether the said finding is correct or not for the reasons stated by the Tribunal. Whenever an inference is required to be drawn on the basis of facts found and in doing so, some principle for appreciation of evidence or provision of law is to be applied, then it cannot be said that it remains a finding of fact only. It becomes a mixed question of law and fact and that is how question No. 1 has been referred to his Court. It was not the contention of learned counsel for the assessee that question No. 1 was wrongly referred to this Court. He did concede that question No. 1 is a question of law as contemplated by section 256 (1)" (p. 717).

In view of the aforesaid binding decision between the parties, we hold that the contention raised by the learned counsel for the assessee is without any substance. Still, however, we would deal with the contention raised by the learned counsel for the assessee. In the case of *Greaves Cotton & Co. Ltd.* (supra) the Supreme Court has held that it is well established that the High Court is not a Court of Appeal in a reference under section

66 of the Indian Income-tax Act, 1992, and it is not open to the High Court in such a reference to embark upon a reappraisal of the evidence and to arrive at findings of fact contrary to those of the Tribunal. It has been further held therein that the High Court should confine itself to the facts as found by the Tribunal and to answer the question of law referred to it in the context of those facts. The Supreme Court has ruled that a finding of fact may be defective in law, if there no evidence to support it or if the finding is unreasonable or perverse, but it is not open to the assessee to challenge such a finding of fact unless he has applied for a reference of the specific question under section 66(1) and it is for the party who applies for a reference to challenge those findings of facts first by expressly raising the question about the validity of the finding of fact and if he has failed to do so, he is not entitled to urge before the High Court that the findings of Tribunal are vitiated for any reason. In the case of *ICI (India) (P) Ltd.* (supra), the Supreme Court has held that while the finding of the Tribunal on the facts is final, its decision as to the legal effect of this finding is a question of law. It has been further held that a finding on a question of facts is open to attack as erroneous in law when there is no evidence to support it or if it is perverse. However, when the finding is one of the fact, the fact that is an inference from other basic fact will not alter its character as one of the fact.

We are in respectful agreement with the principle laid down by the Supreme Court in the above mentioned decisions. However, we are of the opinion that the principle laid down in the said decisions is not applicable to the facts of the present case. The basic facts recorded by the Tribunal were that the assessee had gifted his one-third share in the land situated at Paldi, Ahmedabad, to his brother's sons on 25.3.1966 and on the same day the assessee's brother had transferred his one-third share belonging to him in the said land to the assessee's wife. In the earlier reference which was between the same parties this court rendered decision after accepting the facts found by the Tribunal, namely, that the assessee gifted one-third share in the land situated at Paldi to his brother's sons on 25.3.1966 and on the same day, the assessee's brother transferred the one-third share belonging to him in the said land to the assessee's wife. The above-referred two findings were not interfered with in any manner by this Court while rendering opinions in the said reference. However, in that case, the Court has noted that the finding recorded by the Tribunal to the effect that there was no intimate connection between the two transfers was an inference having no basis at all. The Court took into consideration the fact that what the assessee and his brother did was to transfer their one-third share in the same piece of land situated at Paldi, Ahmedabad and it was of equal value and there was no special reason for effecting said transfers. The Court has also noted that the transfers were made on the same day and in such circumstances, the Court interfered with legal inference drawn by the Tribunal and came

to the conclusion that there was intimate connection between the two transfers even though the assessee's brother Abdullahmian did not directly benefit as a result of the said transfer.

It may be noted that in the case of *G. Venkataswami Naidu & Co. vs. CIT* (1959) 35 ITR 594 the Supreme Court has held that if the finding of the fact is based on an inference from the primary evidentiary facts proved in the case, its correctness or validity is open to challenge in reference proceedings within the narrow limits. It has been further held therein that it is open to the parties to challenge a conclusion of the fact drawn by the Tribunal on the ground that it is not supported by any legal evidence or that the impugned conclusion drawn from the relevant facts is not rationally possible and if such a plea is established the Court has to consider whether the conclusion in question is not perverse and should not, therefore, be set aside. The said principle has been followed by the Supreme Court in its later decision rendered in the case of *CIT vs. Rajasthan Mines Ltd.* (1970) 78 ITR 45.

As was noted in the earlier reference, the finding to the effect that there was no intimate connection between the two transfers was recorded by the Tribunal after applying a wrong test. Moreover, a question challenging said finding was also referred by the Tribunal for opinion of the High Court. The High Court therein found that wrong principle of law was applied to basic facts proved and in such circumstances, the High Court interfered with the said finding. For the abovementioned reasons we are of the opinion that the decision rendered by this Court, which is now in *Mohmadmiya A. Topiwala's* case (supra) cannot be considered to be without jurisdiction and the same has all its binding force. It may be noted that the judgment and, therefore, the conclusion reached therein cannot be ignored. Having regard to the decision rendered by this Court in the reference between the same parties, the question No. 1 referred to us answered in the negative, i.e., in favour of the revenue and against the assessee.

Placing reliance on the decisions rendered by the Supreme Court in the case of *CIT vs. Prembhai Parekh* (1970) 77 ITR 27 and *CIT vs. Prahladrai Agarwala* (1989) 177 ITR 398 Mr. R.D. Pathak, the learned counsel for the assessee submitted that there is no proximate connection between the income accruing to the spouse of the assessee and the transfer and so the amount of interest earned by wife of the assessee should not have been included in the income of assessee.

We may point out that in *Prem Bhai Parekh's* case (supra) a principle of proximate connection came to be laid down by the Supreme Court on the peculiar facts of that case. There the assessee who was a partner in a firm having 7 annas share retired from the firm on 1.7.1954. Thereafter, he gifted Rs. 75,000 to each of his 4 sons, 3 of whom were minor. There was reconstitution of the firm with effect from 2.7.1954 whereby the major

son became a partner and the minor sons were admitted to the benefits of partnership in the firm. The question was whether the income arising to the minors by virtue of their admission to the benefits of partnership in the firm could be included in the total income of the assessee under section 16(3)(a)(iv) a provision similar to section 16(3)(a)(iii). The Tribunal found that the capital invested by the minors in the firm came from the gifts made in their favour by their father, the assessee. The Supreme Court, while overruling the contention of the revenue came to the conclusion that the connection between the gifts made by the assessee and the income of the minors from the firm was a remote one and that it could not be said that the income arose directly or indirectly from the assets transferred. The Supreme Court, therefore, held that the income that arose to the three minor sons of the assessee by virtue of their admission to the benefits of partnership in the firm could not be included in the total income of the assessee. It appears that the main reason why the Supreme Court so held in the said case was that even though the minors received the gifts from their father on 1.7.1954, their admission to the benefits of partnership on its reconstitution on 2.7.1954, depended on the volition and consent of the partners of the firm and did not flow merely from any right exercisable by the minors. That was why the income accruing to the minors on admission to the benefits of the partnership was held to be remote and having no proximate connection with the transfer of cash by their father to them. The income in the said case accrued neither directly nor indirectly inasmuch as such accrual of income depended upon the volition, consent or discretion of the partners of the firm either to admit those minors to the benefits of the partnership or not. It is in that context that the test of proximate or remote connection was laid down by the Supreme Court in the said decision. This is clear from the following observations of the said judgment:

> "....The connection between the gifts mentioned earlier and the income in question is a remote one. The income of the minors arose as a result of their admission to the benefits of the partnership because of the contribution made by them. But there is no nexus between the transfer of the assets and in the income in question. It cannot be said that income arose directly or indirectly from the transfer of the assets referred to earlier. Section 16(3) created an artificial income. That section must receive strict construction as observed by this Court in *CIT vs. Keshaval Lallubhai Patel* (1965) 55 ITR 637 (SC). In our judgment before an income can be held to come within the ambit of section 16(3), it must be proved to have arisen directly or indirectly from a transfer of assets made by the assessee in favour of his wife or minor children. The connection between the transfer of assets and the income must be proximate. The income in question must arise as a result of the transfer and not in some manner connected with it". (p. 30)

We may also point out that the aforesaid decision in *CIT vs. Prem Bhai*

Parekh's case (supra) was distinguished by the Supreme Court in *Smt. Mohini Thapar vs. CIT* (1972) 83 ITR 208. In the case of *Smt. Mohini Thapar* (supra), late Karam Chand Thapar had made certain cash gifts to his wife Smt. Mohini Thapar. From out of those gifts, she purchased certain shares and the balance amount she invested. The share earned dividends and the investments yielded interest. The interest realised and the dividends earned were included in the income of Karam Chand Thapar for the purpose of assessment. The assessee objected to the inclusion of that amount in his income. The question was whether the department was entitled to include the dividends and interest in question in computing the taxable income of the assessee. The ITO held that they were liable to be included in the income of the assessee. That decision was upheld by the AAC. On a reference, the Calcutta High Court confirmed the view taken by the Tribunal.The Supreme Court referred to the decision rendered by it in the case of *Prembhai Parekh* (supra). On the facts of the case, the Supreme Court found that the income had a proximate connection with the transfer of the assets made by the assessee and, therefore, held that the ratio laid down in the case of *Prembhai Parekh* (supra), was not applicable to the facts of the said case. In other words, the Supreme Court held in *Smt. Mohini Thapar's* case (supra) that the transfer of assets made by the assessee to his wife was 'direct transfer' and that the income arising out of the deposits and shares purchased by her was an 'indirect income' and that such income has a 'proximate connection' with the transfer of the assets.

In the case of *Prahladrai Agarawala* (supra) the respondent had made two gifts of money to his wife in November 1960 and another gift to his mother. They became partners in a firm in which the other partners were the respondent's grand-father, his brother and a stranger. The wife contributed both the amounts of the gifts as capital to the firm. The question was whether the share of profits of the wife in the firm for the assessment year 1962-63 could be included in the total income of the respondent under section 64(1)(iii) of the Act. The Tribunal held that the share of profits could be included in the respondent's total income; but on a reference, the Calcutta High Court held that the share of the profits arose to the respondent's wife primarily because the firm made a profit and although it had connection with the gifts, it did not arise as a result of the gift. The High Court further held that the admission of the respondent to his wife were too remote to be included within the provision of section 64(1) (iii). On appeal, the Supreme Court has, while confirming the decision of the High Court, held that there had to be a proximate connection between the accrual of income and the assets transferred. The Supreme Court further held that there had to be no doubt, the wife became a partnership and the mere contribution of the capital by the wife would not automatically have entitled her to partnership in the firm. In the ultimate conclusion, the Supreme Court has held that the share of the profits of the wife could not be included in the respondent's

total income under section 64(1)(iii). To our mind, it is apparent that, the main reason why their Lordships of the Supreme Court so held in *Prahladrai Agarawala's* case (supra) was that, upon an agreement by the remaining partners, the wife became member of the partnership and the mere contribution or the capital by the wife did not automatically entitle her to partnership in the firm. As the partnership was based on agreement and it was the event of agreement between the partners that brought the respondent's wife into partnership as a partner, it was held therein that the share of profits of the wife could not be included in the respondent's total income under section 64(1)(iii). The income in the said case accrued neither directly nor indirectly as much as such accrual of income depended upon the volition or discretion of the partners of the firm to admit the respondent's wife to the partnership as a partner. It is in that the test of proximate or remote connection has been laid down by the Supreme Court in the said case. In our view, the principles laid down in the said case would not apply to the facts of the present case at all inasmuch as, as noted earlier, after the sale of the land, which was gifted to her by the assessee's elder brother, the wife of the assessee had invested that amount received as consideration, with the assessee and the assessee was paying interest to his wife on the amount invested by her. Here, we are dealing with the income which has proximate connection with the transfer of the assets made by the assessee. On plain reading of section 64(1)(iii), it is evident that the income arising to the wife has to be included in the total income of her husband, if the following conditions are fulfilled :

(i) There must be transfer of assets by the assessee to his wife;

(ii) The transfer in favour of the wife by the assessee must be otherwise than for adequate consideration; and

(iii) The income in question should have arisen or accrued to the wife directly or indirectly from the assets transferred to her by her husband.

In our view, all the conditions mentioned in section 64(1)(iii) stand satisfied on the facts of the present case and, therefore, the ITO was justified in adding the amounts of Rs. 2,860 and Rs. 7,195 to the income of the assessee while working out the assessee's income for the assessment year 1974-75. We are of the opinion that, on the facts and in the circumstances of the case, the Tribunal was not right in law in confirming the order of the AAC deleting the addition of Rs. 7,195 as income of the assessee under section 64. Question No. 2 referred to us is answered in the negative, i.e. in favour of the revenue and against the assessee.

The reference stands disposed of, accordingly, with no order as to costs.

(1995) 126 Taxation 358 (Ker.)

IN THE HIGH COURT OF KERALA

(Before Hon'ble Mr. Justice Varghese Kalliath & Hon'ble Mr. Justice P.A. Mohammed)

Writ Appeal No. 316 of 1984

E.K. Jose

vs.

Addl. Agricultural Income-tax Officer & Others

For the Appellant	:	**Dr. Vincent Panikulangara**
For the Respondent	:	**None**
Decided on	:	25.2.1994

KERALA AGRICULTURAL INCOME-TAX ACT — Estimate of income — Assessment completed after inspection report — No objection raised at pre-assessment stage against findings recorded in inspection report — Assessment confirmed in appeal and in revision — Held, evidentiary value of inspection report not to be minimised — No application moved before AAC against inspection report — Order of Board of Revenue based on cogent material — Appeal dismissed.

Kerala Agricultural Income-tax Act, 1950.

FACTS

This is a writ appeal against the judgment of the learned single Judge filed by the writ petitioner, who is an assessee under the provisions of the Agricultural I.T. Act, 1950. The substantial relief that subsists for consideration is to quash order passed by the third respondent, Commissioner of Agricultural I.T. Board of Revenue.

DECISION

The inspection report made available by an officer not below the rank of an Agricultural ITO is a material piece of evidence. The evidentiary value of the inspection report cannot be minimised according to the convenience of the assessee. According to the Hon'ble High Court, if the appellant had any grievance against the report, he could have very well moved an application before the AAC under the above provision and obtained a fresh report regarding the correct yield and cultivation expenses. In revision against the order, the Board of Revenue has directed certain modifications. In fact the learned Judge, it appears, had very anxiously considered all the points urged before him. The jurisdiction of the Board of Revenue, it appears, had been exercised in a reasonable and proper manner. The findings entered are neither perverse nor unsupported by any materials. The Hon'ble Court felt that the conclusions arrived at by the learned single Judge were sound, fair and reasonable and so they were only to be approved without any reserve. The appeal was accordingly dismissed.

Full text of the Judgment is given below :

JUDGMENT

(P.A. Mohammed, J.)

This is a writ appeal against the judgment of the learned single Judge in O.P. No. 7924 of 1989 filed by the writ petitioner, who is an assessee under the provisions of the Agricultural I.T. Act, 1950 (for short 'the Act'). The substantial relief that subsists for consideration in the writ petition is to quash Ext. P7 order passed by the third respondent, Commissioner of Agricultural I.T. Board of Revenue. Trivandrum under s. 34 of the Act.

This is not a case where third respondent has entirely rejected the claims of the appellant in revision. Third respondent has in fact directed certain modifications in the matter of estimating yield and expenses for the year 1987-88. Ext. P3 assessment order and Ext. P5 appellate order challenged in the writ petition have necessarily merged in Ext. P7 order of the third respondent. Thus we have before us Ext. P7 order of the Board of Revenue directing the assessing authority to effect certain modifications in the assessment for the year 1987-88 for consideration in this appeal.

Learned counsel for the appellant mainly focussed his attack on the estimate of yield from rubber during the year 1987-88. The argument is that there was sudden increase of annual yield from 23 qtls. (for the years 1984-85 to 1986-87) to 46 qtls. (for the year 1987-88) and that, therefore, the income estimated for the year 1987-88 cannot be said to be reasonable or fair. In order to substantiate this point the appellant wants us to rely on the inspection report dt. 28th Dec., 1982 obviously discarding Ext. P1 inspection report dt. 28th April, 1988. This approach as it appears to us, is basically deceptive. When the assessment order in dispute admittedly relates to the year 1987-88, it is difficult for this Court to adopt a report relating to an anterior period, that is to say, a report relating to the year 1982-83. What we can legitimately adopt here is the inspection report dt. 28th Dec., 1982 obviously discarding Ect. P1 inspection report dt. 28th April, 1988, which relates to the relevant accounting year even though serious attempt was made to belittle the said report by the appellant. The inspection report made available by an officer not below the rank of an Agrl. ITO is a material piece of evidence, inasmuch as, the officer has the statutory power to enter into any land belonging to an assessee and inspect any accounts, registers and other documents, which such officer considers to be relevant for the purpose of any proceeding under the Act. The evidentiary value of the inspection report cannot be minimised according to the convenience of the assessee. The report is ordinarily prepared after the inspection of the land as authorised by the provisions of the Act and after obtaining the adequate data for fixing the yield from the properties.

Ext. P1 report came to the fore as a result of the sudden inspection made by the officer on 28th April, 1988. Of course the assessee makes serious

challenge as to the correctness of the results obtained through the inspection. However, the genuineness of the said report cannot be ruled out. Though the inspection was sudden, the assessee's son who was on the spot had signed the report in token of he being present at the time of inspection. Needless to point out that Ext. P1 report could have been challenged in appropriate proceedings and its evidentiary value could have thus been whittled down if criticism now advanced against it is proved. The contents of the report were made available according to the appellant, for the first time in pre-assessment notice for the year 1987-88. But it appears to us, no objection was raised in the reply to the pre-assessment notice against the findings in the inspection report. Thus the assessee by his own conduct allowed Ext. P1 report to remain intact and to hold the field. Of course, the pre-assessment notice for the year 1987-88 was based on the findings in Ext. P1 report, which was necessarily made as the basis for Ext. P3 assessment order for the year 1987-88.

We cannot countenance the argument that the appellant had no opportunity to contradict the findings in Ext. P1 report. As against Ext. P3 order of assessment the appellant had filed an appeal before the second respondent under s. 31 of the Act. Proviso to sub-s. 31 authorises the AAC who deals with the appeal against an order of assessment to issue commission to ascertain and report the yield and cultivation expenses in appropriate cases. By this proviso the appellant has been given the right to move an application before the AAC for the aforesaid purposes. According to us, if the appellant had any grievance against Ext. P1 report, he could have very well moved an application before the AAC under the above provision and obtained a fresh report regarding the correct yield and cultivation expenses. Such a right available under the aforesaid provision has not been made use of by the appellant. Ext. P3 assessment order has been confirmed in appeal as per Ext. P5 by the second respondent. In revision against Ext. P5 order, the Board of Revenue, as pointed out earlier, has directed certain modifications as per Ext. P7. In the aforesaid background, we do not find our way to interefere with Ext. P7 revisional order passed by the Board of Revenue.

In fact the learned Judge, it appears to us, has very anxiously considered all the points urged before him. even though the points advanced are purely questions of fact which are not normally gone into in the present proceeding. Further, the jurisdiction of the third respondent Board of Revenue under s. 34, it appears to us, has been exercised in a reasonable and proper manner. We have no hesitation to agree with the observation of the learned single Judge that the findings entered by respondents 1, 2 and 3 are neither perverse nor unsupported by any materials. We feel the conclusions arrived at by the learned single Judge are sound, fair and reasonable and so they are only to be approved without any reserve. We do so.

We see no merit in this writ appeal. It is accordingly dismissed.

(1995) 126 Taxation 361 (Ker.)

IN THE HIGH COURT OF KERALA

(Before Hon'ble Justice Mr. T.L. Viswantha Iyer &
Hon'ble Justice Mrs. K.K. Usha)

IT Reference No. 373 of 1985

Commissioner of Income-tax
vs.
C. Sekharan

For the Appellant : **P.K. Menon and N.R.K. Nair**
For the Respondent : **S.A. Nagendran and Premjit**
Decided on : 7-10-1994

POWER OF THE TRIBUNAL — Assessee claiming weighted deduction before CIT(A) for the first time — CIT(A) refusing assessee to raise additional ground — Tribunal admitting additional ground — Remanding the matter to CIT(A) — Held, Tribunal justified in admitting additional ground.

Income-tax Act, 1961 — Section 35B.

FACTS

The assessee had omitted to make a claim for weighted deduction u/s 35B before the assessing authority but raised the contention when the matter was pending in appeal before the CIT (A). The CIT(A), however, refused to entertain the claim as he felt that the decision in CIT (Addl.) vs. Gurjargravures P. Ltd. (1978) 111 ITR 1 (SC) stood in the way of his entertaining the plea. The Tribunal, however, took a different view and came to the conclusion that this point is liable to be dealt with. Accordingly, it directed the ITO to go into the question and decide whether the assessee was entitled to the relief u/s 35B. It is based on the decision of the Tribunal that the aforesaid question of law was directed to be referred in the petition u/s 256(2).

DECISION

The Hon'ble Court held that there is no dispute about the *bonafides* of the assessee so far as this case is concerned. The Tribunal has found that this is eminently a fit case where the assessee should be permitted to raise additional points in the appeal. Nothing has been made out before us to show that the assessee acted unreasonably or that he was in default. The Tribunal has, therefore, acted perfectly and legally in permitting the assessee to raise additional points about section 35B in the appeal and directing the ITO to deal with the matter on its merits. The Hon'ble Court, therefore, did not find any merit in the contentions raised by the revenue, which accordinly stand concluded by the decision of the Supreme Court aforesaid.

Cases referred to :

1. *CIT(Addl.) vs. Gurjargravures P.Ltd.* (1978) 111 ITR 1 (SC)

2. *CIT vs. Kanpur Coal Syndicate* (1964) 53 ITR 225 (SC)
3. *Jute Corporation of India Ltd. vs. CIT* (1991) 187 ITR 688 (SC)
4. *Rai Kumar Srimal vs. CIT* (1976) 102 ITR 525 (Cal)

Full text of the Judgment is given below :

JUDGMENT

(T.L. Viswanatha Iyer, J.)

The Income-tax Appellate Tribunal, Cochin Bench, has referred the following question for determination of this court under section 256(2) of the Income-tax Act, 1961, namely:

> "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in admitting the ground raised by the assessee and restoring the matter to the Income-tax Officer for proper disposal in accordance with law?"

The assessee had omitted to make a claim for weighted deduction under section 35B before the assessing authority but raised the contention when the matter was pending in appeal before the Commissioner of Income-tax (Appeals). The Commissioner, however, refused to entertain the claim as he felt that the decision in *CIT (Addl.) vs. Gurjargravures P. Ltd.* (1978) 111 ITR 1 (SC) stood in the way of his entertaining the plea. The Tribunal, however, took a different view and came to the conclusion that this point is liable to be dealt with. Accordingly, it directed the Income-tax Officer to go into the question and decide whether the assessee was entitled to the relief under section 35B. It is based on this decision of the Tribunal that the aforesaid question of law was directed to be referred in the petition under section 256(2).

Though the question is one of law, it is unnecessary to deal with the matter in detail for the reason that the applicability of the decision in *CIT (Addl.) vs. Gurjargravures P. Ltd.* (1978) 111 ITR 1 SC) was the subject of consideration by the Supreme Court in *Jute Corporation of India Ltd. vs. CIT (1991) 187 ITR 688*. The Supreme Court noted that the aforesaid decision had been rendered without taking note of the earlier three Bench decision in *CIT vs. Kanpur Coal Syndicate* (1964) 53 ITR 225 (SC). They also held that the decision in *Gurjargravures P. Ltd.'s* case (1978) 111 ITR 1 (SC) was one rendered on the peculiar facts and circumstances of the case and was not one of the general application. Accordingly, they held that the appellate authority could entertain the additional ground of appeal and that the entertainability or otherwise of the question will depend upon the facts and circumstances of each case. The Supreme Court said that no rigid principles or any hard and fast rule can be laid down for the purpose. Eventually the question was one of the Appellate Assistant Commissiner being satisfied of the appellant's *bona fides*. In doing so, the Supreme Court relied on the decision of the Calcutta High Court in *Rai Kumar Srimal*

vs. CIT (1976) 102 ITR 525, where the Bench presided over by Sabyasachi Mukharji J., said that the Appellate Assistant Commissioner was entitled to admit new grounds or evidence either *suo motu* or at the invitation of the parties. If he was acting on the invitation by the assessee, there must be some ground for admitting new evidence in the sense that there must be some explanation to show that the failure to adduce evidence earlier was not wilful and not unreasonable. This view enunciated by Sabyasachi Mukharji J., in the judgment of the Calcutta High Court found favour with the Supreme Court.

There is no dispute about the *bona fides* of the assessee so far as this case is concerned. The Tribunal has found that this is eminently a fit case where the assessee should be permitted to raise additional points in the appeal. Nothing has been made out before us to show that the assessee acted unreasonably or that he was in default. The Tribunal has, therefore, acted perfectly and legally in permitting the assessee to raise additional points about section 35B in the appeal and directing the Income-tax Officer to deal with the matter on its merits. We do not, therefore, find any merit in the contentions raised by the Revenue, which according to us, stand concluded by the decision of the Supreme Court aforesaid.

We, therefore, answer the question referred to us in the affirmative, that is, in favour of the assessee and against the Revenue. No costs.

Communicate a copy of this judgment under the seal of this court and the signature of the Registrar to the Income-tax Appellate Tribunal, Cochin Bench, for information.

(1995) 126 Taxation 363 (Mad.)

IN THE HIGH COURT OF MADRAS

(Before Hon'ble Justice Mr. Venkataswami & Hon'ble Justice Mr. Jayasimha Babu)

IT Reference No. 224 of 1981

Tax case No. 538 of 1981

Commissioner of Income-tax
vs.
Sri Ramavilas Service Ltd.

For the Appellant	:	**C.V. Rajan**
For the Respondent	:	**P.P.S. Janarthana Raja, Padmanabhan and Rama Mani**
Decided on	:	23-3-1994

BUSINESS EXPENDITURE — Retrenchment compensation and notice pay paid to employees — Payment made in accordance with the agreement under voluntary retirement scheme — Held, expenditure allowable.

Income-tax Act, 1961 — Section 37.

FACTS

The assessee claimed a sum of Rs. 23,084/- as compensation paid to the employees who retired voluntarily, and that the said sum must be treated as business expenditure. The ITO did not agree that the said sum was expended by way of business expenditure as it cannot be considered as statutory liability in terms of the provisions of section 25F, 25FF or 25FFF of the Industrial Disputes Act. The ITO further held that the payment must be treated as voluntary and on that ground, disallowed the claim of the assessee.

DECISION

The Hon'ble Court held that it is seen from the order of the ITO that the payment of Rs. 23,084/- was as per the scheme agreed to between the assessee and the employees. That being the position, can it be said that the amount represented a voluntary payment as contended by the Revenue, or can it be treated as business expenditure, as contended by the assessee. The Hon'ble Court held that there was a scheme pursuant to which the amount in question was given and hence was allowable as a deduction.

Cases referred to:

1. *CIT vs. George Oakes Ltd.* (1992) 110 Taxation 46 (Mad); (1992) 197 ITR 288 (Mad)
2. *Sassoon J. David & Co. P. Ltd. vs. CIT* (1979) 118 ITR 261 (SC)

Full text of the Judgment is given below :

JUDGMENT

(Venkataswami, J.)

At the instance of the Revenue, the Tribunal has referred the following two questions under section 256(1) of the Income-tax Act, 1961, for the decision of this court :

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the provision for monetary value of the unavailed leave salary of the employees should be allowed as a deduction? and

(2) Whether, on the facts and in circumstances of the case, the Appellate Tribunal was right in holding that the sum of Rs. 23,084 being the retrenchment compensation andnotice pay to the employees voluntarily retired would be an admissible deduction?"

Mr. C.V. Rajan, learned counsel appearing for the Revenue, submitted that he has instructions not to press the first question. Accordingly, we are returning the first question without giving any answer.

So far as the second question is concerned, the brief facts are the following:

The assessee claimed a sum of Rs. 23,084 as compensation paid to the employees who retired voluntarily, and that the said sum must be treated as business expenditure. The Income-tax Officer did not agree that the said sum was expended by way of business expenditure as it cannot be considered as statutory liability in terms of the provisions of section 25F, 25FF, or 25FFF of the Industrial Disputes Act. The Income-tax Officer further held that the payment must be treated as voluntary, and, on that ground, disallowed the claim of the assessee. On appeal by the assessee, the Appellate Assistant Commissioner allowed that claim, applying the decision of the Tribunal in Income-tax Appeal No. 193 of 1977-78. On further appeal by the Revenue, the Tribunal upheld the order of the Appellate Assistant Commissioner. Hence, the present reference at the instance of the Revenue.

It is seen from the order of the Income-tax Officer that the payment of Rs. 23,084 was as per the scheme agreed to between the assessee and the employees. That being the position, can it be said that the amount represented a voluntary payment as contended by the Revenue, or can it be treated as business expenditure, as contended by the assessee, is the question to be decided.

This matter is no longer *res integra*. In *CIT vs. George Oakes Ltd.* (1992) 197 ITR 288, a Division Bench of this court had occasion to decide an identical issue, and we are told that the assessee in the case was a sister concern of the assessee in the case on hand. Ratnam J., as the learned judge then was, speaking for the Bench, while answering a question identical to the present one, has observed as follows (at page 291) :

> "....In other words, though under the provisions of the Industrial Disputes Act as such, no liability was cast on the assessee for making available the benefits of retrenchment to the nine retired workmen, yet, under the standing orders, it became necessary for the assessee to meet that obligation. The purpose of retrenching the nine workmen, as found by the Tribunal, was only to contain the loss, reorganise the branch by reducing the staff and to bring about a reduction in the wage bill as well. These are matters of management pertaining to business considerations and expediency and the expenditure incurred by the assessee in this regard was for purposes of business and also with a view to maintaining good relationship with labour and the expenditure has to be considered as having been laid out wholly and exclusively for business purposes of the assessee. A reference in this connection may be made to *Sassoon J. David and Co. P. Ltd. vs. CIT* (1979) 118 ITR 261 (SC), where the Supreme Court stated that it is not the stand of the Revenue that the sum of Rs. 2,481 representing the payment of notice pay to the nine workmen is not reasonable. Therefore, the third question is answered in the affirmative and against the Revenue."

As noticed by the learned judges in the decided case of *CIT vs. George*

Oakes Ltd. (1992) 197 ITR 288 (Mad), here also there was a scheme pursuant to which the amount in question was given. The decision of the Supreme Court referred to above (in the extract supra), fully supports the stand taken by the assessee, and in the circumstances, we find no difficulty in answering the second question against the Revenue and in the affirmative. The Revenue will pay the costs which are fixed at Rs. 500.

(1995) 126 Taxation 366 (Mad.)

IN THE HIGH COURT OF MADRAS

(Before Hon'ble Justice Mr. Venkataswami & Hon'ble Justice Mr. Jayasimha Babu)

IT Reference Nos. 235 & 236 of 1981

Commissioner of Income-tax

vs.

E.L. Navaneetha Chettiar & Sons

For the Appellant	:	**C.V. Rajan**
For the Respondent	:	**P.P.S. Janarthana Raja**
Decided on	:	23-3-1994

TRANSFER OF PROPERTY — Property owned by firm — Transfer to parties by book entries — Held, not a valid transfer of property since transfer without registration — Income from property assessable in the hands of the firm.

Income-tax Act, 1961 — Section 22.

FACTS

The A.Ys. involved are 1974-75 and 1975-76. For the A.Ys. in question, the ITO added Rs. 6,000/- and Rs. 9,000/- respectively, as income from the house property. That was objected to by the assessee on the ground that as per the entries in the account books, the property was transferred to the partners and thereafter it was no longer the property of the firm and hence income from the property cannot be added to the income of the assessee firm.

DECISION

Even on the basis that the properties of the firm should be deemed to have been held in common by all the partners, as a firm is not a legal entity and cannot hold properties, there could not be a division of the properties purchased in the name of the firm as amongst the partners by making entries in the accounts of the firm without actual dissolution of the firm. Even assuming that the firm's properties were owned and enjoyed in common by the partners, such common properties cannot be possessed and enjoyed in severalty unless there is a document in writing. The release of the partner's share in specified properties of the firm will be a transfer of the interest

in immovable property and any transfer of such interest in immovable property will require registration if the value of the interest exceeds Rs. 100/-. Book entries do not make a conversion of any kind known to law. They are only entries made by the book-keeper and find a place only in account books. They cannot by their own force effect any conveyance, release, partition or other transfer of immovable properties. A combined reading of the entries in the instant case would clearly show that the position which was wished for by the parties had not been properly brought about by any effective transaction known to law.

Cases referred to

1. *CIT vs. Dadha & Co.* (1983) Taxation 71(3) 15, (1983) 142 ITR 792 (Mad)
2. *CIT vs. Palaniappa Enterprises* (1984) 150 ITR 237 (Mad)

Full text of the Judgment is given below :

JUDGMENT

(Venkataswami, J.)

The Tribunal, at the instance of the Revenue, has referred the following two questions for the decision of this court :

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in holding that the property in question is not the property of the firm after March 31, 1972, and as such the income therefrom cannot be assessed in the hands of the firm for the assessment year under consideration?

(2) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the transfer of the house property belonging to the firm, Messrs. E.L. Navaneetha Chettiar and Sons, to the partners without any registered document while the firm was still in existence, by mere book entries, was valid transfer in law?"

The brief facts are the following :

These two references relate to the assessment years 1974-75 and 1975-76. The respondent/assessee was a partnership concern. For the assessment years in question, the Income-tax Officer added Rs. 6,000 and Rs. 9,000, respectively, as income from the house property. That was objected to by the assessee on the ground that as per the entries in the account books, the property was transferred to the partners and thereafter it was no longer the property of the firm and hence income from the property cannot be added to the income of the assessee-firm. The Income-tax Officer did not agree with the assessee and consequently included the said two amounts in the income of the assesee. Aggrieved by that, the assessee preferred two appeals to the Appellate Assistant Commissioner. The Appellate

Assistant Commissioner also held that transfer without any registered document, but by merely making transfer entries in the account books of the firm, is not sufficient and, therefore, the house property continued to be the asset of the firm, and, on that view, dismissed the appeals. The assessee preferred further appeals to the Tribunal. The Tribunal purporting to follow its earlier order in Income-tax Appeal No. 381 of 1974-75, dated August 25, 1976, on a similar issue, held that the entries in the books of account are sufficient to transfer the interest in the property to the individual partners, and, on that view, allowed the claim of the respondents/ assessees. Aggrieved by that, the Revenue sought the present references.

Mr. C.V. Rajan, learned counsel appearing for the Revenue, submitted that the Tribunal followed its earlier order in Income-tax Appeal No.381 of 1974-75, dated August 25, 1976, that was taken up to this court by way of reference by the Revenue, and this court, in the decision rendered in *CIT vs. Dadha and Co.* (1983) 142 ITR 792, differed from the view taken by the Tribunal and held that unless the transfer was by a process known to law, the same cannot be recognised and, therefore, the house property will continue to be the property of the firm.

In the said decision, the learned judges (Ramanujam J. and Balasubrahmanyan J.), though delivered separate judgments, concurrd on the view abovementioned.

In the view of Ramanujam J. (headnote) :

> ".... even on the basis that the properties of the firm should be deemed to have been held in common by all the partners, as a firm is not a legal entity and cannot hold properties, there could not be division of the properties purchased in the name of the firm as amongst the partners by making entries in the account of the firm without actual dissolution of the firm. Even assuming that the firm's properties were owned and enjoyed in common by the partners, such common properties cannot be possessed and enjoyed in severalty unless there is a document in writing. When common ownership of two persons is transferred into two individual ownerships, there is a transfer of an interest, in that there is a mutual release by one in favour of the other as regards the interests transferred in favour of the other. The release of the partner's share in specified properties of the firm will be a transfer of such interest in immovable property will require registration if the value of the interest exceeds Rs. 100. The book entries made on November 16, 1963, by which the common properties of the partners were treated as the separate properties of each of the partners to the extent of their share, could not have any effect without there being an instrument in writing evidencing the transfer of the interest.
>
> Accordingly, the assessment of the capital gains as well as the income therefrom and the interest earned on the unpaid consideration in the hands of the firm was justified."

According to Balasubrahmanyan J. (headnote) :

> "The only way the co-owners of immovable property have of creating separate dimensions over as many separate interests as there are co-owners would be by way of a regular deed of partition. Co-ownerhsip of property cannot fall apart as separate individual interests without a deed of partition or at any rate a deed of mutual release. Any such instrument, whether it be a regular deed of partition or a release deed, must be duly stamped as contemplated under the Indian Stamp Act, if the value thereof is over Rs. 100.
>
> Book entries do not make a conversion of any kind known to law. They are only entries made by the book-keeper and find a place only in account books. They cannot by their own force effect any conveyance, release, partition or other transfer of immovable properties. A combined reading of the entries in the instant case would clearly show that the position which was wished for by the parties had not been properly brought about by any effective transaction known to law."

It is also brought to our notice by Mr. C.V. Rajan, learned counsel appearing for the Revenue, that an attempt was made subsequently to have the earlier view taken in the case reported in *CIT vs. Dadha and Co.* (1983) 142 ITR 792 (Mad) reconsidered. However, this court in the case of *CIT vs. Palaniappa Enterprises* (1984) 10 ITR 237, reaffirmed the view taken in *CIT vs. Dadha and Co*, (1983) 142 ITR 792 (Mad), and held that there was no case for reconsideration.

In view of the above decisions of this court, we hold that the Tribunal was not right in deciding the issue in favour of the assessee. Accordingly, the questions are answered in the negative and in favour of the Revenue, and the Revenue is entitled to get costs from the assessee. Costs one set Rs. 1,000.

(1995) 126 Taxation 369 (Ori.)

IN THE HIGH COURT OF ORISSA

(Before Hon'ble Justice Mr. G.B.Patnaik & Hon'ble Justice Mr. P.C. Naik)

Special Jurisdiction Case No. 54 of 1989

Commissioner of Income-tax

vs.

Rabindranath Bhol

For the Appellant	:	**A.K. Ray**
For the Respondent	:	**None**
Decided on	:	22-11-1994

EXEMPTION — Assessee owner of house property — Part of the

property used for purpose of business of the firm — Assessee claiming exemption u/s 22 — Held, business carried by firm is business carried by partner — Assessee entitled to exemption.

Income-tax Act, 1961 — Section 22.

FACTS

The assessee, and individual, is also a partner of a partnership firm. The said assessee had allowed some rooms in his building where the partnership business was being carried on. No rent was being charged from the said partnership firm. During the A.Y. 1983-84, the assessee contended that the rooms wherein the buinsess was being carried on by the partnership firm of which the assessee himself is a partner should be excluded while computing the income from house property u/s 22 of the Income-tax Act. The ITO, however, rejected the said claim and on the basis of the rent which the assessee was receiving from other tenants computed the notional income in respect of the rooms under the occupation. The Tribunal directed the ITO to allow necessary deduction u/s 22.

DECISION

The Hon'ble Court held that a partnership as defined in section 4 of the Indian Partnership Act is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Therefore, when a firm carries on business, it is business carried on by the partners of the firm. One partner is the agent of the other in carrying out that business. Consequently, when a partnership carries on a business, each partner thereof must be said to be carrying on that business. The income from a house property owned by the assessee partner and used in the business carried on by the partnership firm in which the assessee is a partner would qualify for the exemption provided in section 22 of the Income-tax Act, 1961. The Hon'ble Court accordingly answered the question in favour of the assessee and against the Revenue.

Cases referred to:

1. *CIT vs. Rasiklal Balabhai* (1979) 119 ITR 303 (Guj)
2. *CIT vs. Guruswamy K.N.* (1984) 146 ITR 34 (Kar)
3. *Bhai Sunder Dass & Sons vs.CIT* (1972) 85 ITR 28 (Del)
4. *CIT vs. Gotla J.H.* (1985) Taxation 79(3) - 215 (SC) (1985) 156 ITR 323 (SC)
5. *Sarvamangala Properties Ltd. vs. CIT* (1923) 90 ITR 267 (Cal.)
6. *Shanti Kumar Narottam Morarji vs. CIT* (1955) 27 ITR 69 (Bom.)

Full text of the Judgment is given below ;

JUDGMENT

(G.B. Patnaik, J.)

On an application being filed by the Department under section 256(1) of

the Income-tax Act, 1961, the Income-tax Appellate Tribunal has referred the following questions for the opinion of this court and a statement of the case has been made. The two questions referred are :

"(i) Whether income from a house property owned by a partner and used in the business carried on by the partnership firm would qualify for the exemption provided in section 22 of the Income-tax Act, 1961 ?

(ii) On the facts and in the circumstances of the case, whether the Tribunal was justified in allowing deduction under section 23(2) of the Income-tax Act ?"

The assessee, an individual, is also a partner of a partnership firm. The said assessee had allowed some rooms in his building where the partnership business was being carried on. No rent was being charged from the said partnership firm. During the assesment year 1983-84, the assessee contended that the rooms wherein the business was being carried on by the partnership-firm of which the assessee himself is a partner should be excluded while computing the income from house property under section 22 of the Income-tax Act. The Income-tax Officer, however, rejected the said claim and on the basis of the rent which the assessee was receiving from other tenants computed the notional income in respect of the rooms under the occupation of the partnership firm and then determined the tax liability. The assessee carried the matter in appeal, but the appellate authority dismissed the appeal as the business of the partnership-frm cannot be said to be the business of the assessee himself. The assesse then carried the matter in second appeal to the Tribunal. The Tribunal came to the conclusion that the portion of the building which is utilised by the partnership firm should be treated as being used by the assessee for the purpose of business and, therefore, the income from such property would not be taxable under section 22. It accordingly directed deletion of the income in respect of that portion of the property which was being occupied by the partnership firm. In respect of the claim of the assesee for deduction under section 23(2) for a portion of the building which was under the occupation of the bank, the Tribunal took into account the fact that the Income-tax Officer had allowed such deduction in respect of the assessee for the assessment year 1987-88 and, therefore, there was no reason why the same should not be allowed in respect of the year under consideration. Accordingly, the Tribunal directed the Income-tax Officer to allow necessary deduction under section 23. The appeal of the assessee thus having been allowed, the Department moved the Tribunal under section 256(1) of the Income-tax Act, 1961, and the Tribunal on being satisfied had referred two questions as already stated for the opinion of this court.

(1995) 126 Taxation 372 (Ker.)
IN THE HIGH COURT OF KERALA
(Before Hon'ble Mr. Justice T.L. Viswanatha Iyer)
Original Petition No. 10838 of 1989

Ramachandran & Co.

vs.

Income-tax Officer & Another

For the Appellant : **P. Balachandran**
For the Respondent : **P.K. Ravindranatha Menon with N.R.K. Nair**

Decided on : 24.5.1994

WAIVER/REDUCTION OF INTEREST — Return due to be filed on 31.7.1984 — Extension sought till 31-3-1985 — Retrurn filed on 31-3-1986 — Investigation started — During pendency of investigation assessee filing revised return under amnesty scheme disclosing income of Rs. 8.40 lakhs against Rs. 4.43 lakhs disclosed — ITO making substantial additions to taxable income — On appeal addition of Rs. 50,000/- only maintained — Assessee claimed waiver of interest charged u/ss 139(8), 215 and 216 by filing revision petition on ground of amnesty scheme — Revision petition dismissed — Held, benefit of amnesty scheme not available since revised return filed after investigation — Further being the revised return did not disclose true income — Revision petition rightly dismissed.

Amnesty Scheme, 1985

Income-tax Act, 1961 — Sections 139(8), 215 & 216.

FACTS

The petitioner which is a firm, was doing business as abkari contractors during the accounting year ending 31.3.1984. The return for the corresponding A.Y. 1984-85 was due on 31.7.1984 but the petitioner sought for extension of time till 31.3.1985, and filed the return one year later on 31.3.1986 disclosing a total income of Rs. 4,43,370/-. The ITO started investigation on receipt of the return and called for various details. While the proceedings were thus going on, the petitioner purported to take advantage of the Amnesty Scheme of 1985 and filed a revised return disclosing a total income of Rs. 8,39,810/- for the year. The ITO was not, however, satisfied with this return. He made addition to the total income returned, besides disallowing certain items of expenditure claimed. The taxable income for the year was thus determined at Rs. 15,58,078/-. Apart from demanding tax on this income, demand was also made for Rs. 2,46,102/- by way of interest u/s 139(8), Rs. 1,53,634/- for interest u/s 215 and Rs. 344/- by way of interest

u/s 216. The appeal filed by the petitioner was allowed substantially deleting the addition to the income and confining the disallowances to an amount of Rs. 50,000/-. The assessee filed revision petition before CIT for waiver of interest levied under various sections of the Act. The revision petitions were disposed of by the CIT and were dismissed.

DECISION

The Hon'ble Court held that the petitioner has no case that it is entitled to any waiver by virtue of Rules 40 and 117A of the I.T. Rules, 1962. The reliance was only on the fact that a return was filed purporting to be under the Amnesty Scheme and, therefore, no interest may be charged. This contention does not stand scrutiny for the reason that the return for the year was due on 31.7.1984, extension was sought till 31.3.1985 and the return filed one year later on 31.3.1986. This return did not admittedly disclose the income truly or fully. It was only after the investigation started and the process of assessment was going on that the revised return purporting to be under the Amnesty Scheme was filed on 12.3.1987. Even this return was not accepted and eventually after the order in appeal, the taxable income stood enhanced by an amount of Rs. 50,000/-. The Amnesty Scheme postulates a voluntary and true disclosure of his income by an assessee for the benefits thereof being given to him. In this case, the revised return was evidently prompted by the investigation going on and was made almost on the eve of completion of the assessment, namely on 12.3.1987, the date of assessment being 1.4.1987. The return so filed was neither true nor complete as evident from the enhancement of the taxable income by Rs. 50,000/- even as per the appellate order, which the petitioner accepted and did not challenge in further appeal. The revised return was thus not a true return and, therefore, the petitioner became disentitled to benefits of the Amnesty Scheme. The Hon'ble High Court was in agreement with the reasoning of the CIT on this point.

Case referred to :

CIT vs. Sree Narayana Chandrika Trust (1993) KLJ (Tax Cases) 644

Full text of the Judgment is given below :

JUDGMENT

(T.L. Viswanatha Iyer, J.)

The petitioner which is a firm, was doing business as abkari contractors during the accounting year ending 31.3.1984. The return for the corresponding A.Y. 1984-85 was due on 31.7.1984 but the petitioner sought for extension of time till 31.3.1985, and filed the return one year later on 31.3.1986 disclosing a total income of Rs. 4,43,370/-. The ITO started investigation on receipt of the return and called for various details and particulars from the petitioner by his letter Ext. R1(a) dt. 1st Dec., 1986. While the proceedings were thus going on, the petitioner purported to take

advantage of the Amnesty Scheme of 1985 and filed a revised return disclosing a total income of Rs. 8,39,810/- for the year. That was on 12th March,1987. The ITO was not, however, satisfied with this return as he was of opinion that the petitioner had disclosed a lesser value for the arrack sold by it during this year than the previous year, and for other reasons, he made addition to the total income returned, besides disallowing certain items of expenditure claimed. The taxable income for the year was thus determined at Rs. 15,58,078/- by the order Ext. P1 dt. 1st April, 1987. Apart from demanding tax on this income demand was also made for Rs. 2,46,102 by way of interest under s. 139(8), Rs. 1,53,634 for interest under s. 215 and Rs. 344 by way of interest under s. 216.

The petitioner challenged this order in appeal and simultaneously applied by Ext. P4 dt. 4th May, 1987 to the ITO for waiver of the interest demanded. The ITO rejected this request for waiver of interest by his reply Ext. P5 dt. 15th May, 1987, on the ground that the partners of the petitioner firm had not made corresponding disclosures and payment of tax. The petitioner carried this order [in so far as it related to the interest under ss. 139(8) and 215] in revision before the CIT by the revision petitions Exts. P6 and P7.

In the meanwhile the appeal filed by the petitioner against the order of assessment was allowed substantially deleting the addition to the income and confining the disallowances to an amount of Rs. 50,000. The taxable income was thus fixed at Rs. 8,91,217. The appellate order was implemented by the proceedings Ext. P3, by which the demand for interest was scaled down to Rs. 1,35,828 under s. 139(8), Rs. 75,306 under s. 215 and Rs. 344 under s. 216.

The revision petitions Exts. P6 and P7 were thereafter disposed of by the CIT by the order Ext. P8 dt. 15th Feb., 1989. The petitions were dismissed. The CIT stated:

> "The assessee's argument cannot be accepted for several reasons. Though the assessee filed its original return itself on 31st March, 1986 when the Amnesty Scheme was in force, it did not choose to disclose its full income and it filed a revised return on 12th March, 1987 only after the ITO made enquiries. Actually the ITO did not accept even this revised return under s. 143(1) as is normally done in the Amnesty Scheme. Instead he made further enquiries and made an order under s. 143(3) enhancing the total income to a much higher figure of Rs. 15,58,080. Even the CIT(A) sustained an addition to the extent of Rs. 50,000. The assessee, therefore, does not satisfy the condition of the Amnesty Scheme.
>
> The assessee also could not explain the reasons for the delay in the submission of the return and the reasons for the under-estimation of advance tax. It also cold not explain the reasons for deferment of

instalments of advance tax. For all these reasons I am dismissing the assessee's revision petition."

The petitioner has no case that it is entitled to any waiver by virtue of Rules 40 and 117A of the I.T. Rules, 1962. The reliance was only on the fact that a return was filed purporting to be under the Amnesty Scheme and, therefore, no interest may be charged. This contention does not stand scrutiny for the reason that the return for the year was due on 31.7.1984, extension was sought till 31.3.1985 and the return filed one year later on 31.3.1986. This return did not admittedly disclose the income truly or fully. It was only after the investigation started and the process of assessment was going on that the revised return purporting to be under the Amnesty Scheme was filed on 12.3.1987. Even this return was not accepted and eventually after the order in appeal, the taxable income stood enhanced by an amount of Rs. 50,000/-. The Amnesty Scheme postulates a voluntary and true disclosure of his income by an assessee for the benefits thereof being given to him. In this case, the revised return was evidently prompted by the investigation going on and was made almost on the eve of completion of the assessment, namely on 12.3.1987, the date of assessment being 1.4.1987. The return so filed was neither true nor complete as evident from the enhancement of the taxable income by Rs. 50,000/- even as per the appellate order, which the petitioner accepted and did not challenge in further appeal. The revised return was thus not a true return and, therefore, the petitioner became disentitled to benefits of the Amnesty Scheme. The Hon'ble High Court was in agreement with the reasoning of the CIT on this point in the order Ext. P8.

The CIT was, therefore, justified in dismissing the revision petitions Exts. P6 and P7. I must also note here that the primary benefit under the Amnesty Scheme is exoneration from penalty. What is charged under Exts. P1 and P3 is interest accruing consequent on the delay on the part of the petitioner itself and not penalty.

In this view of the matter, the clarifications made by the CBDT in reply to questions 19 and 21 in Circular No. 451, dt. 17th Feb., 1986 [(1986) 158 ITR (St.) 135], do not have any relevance and do not require consideration.

Counsel for the petitioner, however, raised a question of jurisdiction with the contention that the CIT had dismissed the revision petitions on a new ground different from that taken by the ITO in his order Ext. P5. This is stated to be unjustified, by virtue of the decision of this Court in CIT vs. Sree Narayana Chandrika Trust 1993 KLJ (Tax Cases) 644. I do not find any substance in this contention. That was a case falling under s. 263 and in that context it was observed that the order of the CIT can be sustained by the Tribunal only on the ground stated therein and not on others, as otherwise the Tribunal will be virtually usurping a jurisdiction which is

exclusively that of the CIT. That is not the case here where it is the assessee who approached the CIT in revision under s. 264. It was then open to the CIT to sustain the order impugned on any of the grounds available to him to sustain it. I overrule this contention.

The original petition is, therefore, without merit.

It is dismissed. No costs.

(1995) 126 Taxation 376 (SC)

IN THE SUPREME COURT OF INDIA

(Before Hon'ble Mr. Justice Kuldip Singh,
Hon'ble Mr. Justice B.L. Hansaria and
Hon'ble Mr. Justice S.B. Majumdar)

Civil Appeal Nos. 5653 of 1990, 317, 2855-56
& 4520 of 1991, 525 of 1992, 6920 of 1994,
SLP (C) No. 14714 of 1991 and 2245 of 1992

R. Rajagopal Reddy

vs.

Padmini Chandrasekharan

For the Appellant	:	**P. Chidambaram & Ors.**
For the Respondent	:	**None**
Decided on	:	31-1-1995

BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 — Suits filed prior to coming into operation of the said Act — Held, Sections 4(1) and 4(2) cannot be pressed in service as a defence to benami holders in connection with suits filed prior to coming into operation of these sections — Further held, the said sections not a declaratory provision and not applicable retrospectively.

Benami Transactions (Prohibition) Act, 1988 — Sections 4(1) & 4(2).

FACTS

In this group of matters a common question arises for consideration, 'whether section 4(1) of the Benami Transactions (Prohibition) Act, 1988 can be applied to suit, claim or action to enforce any right in property held benami against person in whose name such property is held or any other person, if such proceeding is initiated by or on behalf of a person claiming to be real owner thereof, prior to the coming into force of section 4(1) of the Act. In fact the question is answered in the affirmative by a Division Bench of this Court in Mithilesh Kumari vs. Prem Behari Khare (1989) 177 ITR 97. In that case two learned Judges of this Court constituting the Division Bench have taken the aforesaid affirmative view. The correctness of that view came up for consideration before

another Division Bench of this Court. That Division Bench by its order dated 10.3.1992 directed that these matters be placed for hearing at the bottom of the miscellaneous list for final hearing on 22.3.1992 before a three Judge Bench. Ultimately this group of matters came to be placed for final hearing before this Bench. In order to appreciate the nature of the controversy posed for our consideration, we may note a few relevant facts leading to these proceedings. In most of the proceedings various suits were filed years back before coming into operation of section 4(1). These proceedings were pending either at the first appeal stage or second appeal stage or in revision before the High Court or in civil appeals before this Court when section 4(1) came into operation. The question is whether these pending proceedings at various stages in the hierarchy can get encompassed by the sweep of section 4(1) and as such suits would be liable to be dismissed as laid down by that section.

DECISION

Before we deal with these six considerations which weighed with the Division Bench for taking the view that section 4 will apply retrospectively in the sense that it will get telescoped into all pending proceedings, howsoever earlier they might have been filed, if they were pending at different stages in the hierarchy of the proceedings even upto this Court, when section 4 came into operation, it would be appropriate to recapitulate the salient feature of the Act. As seen earlier, the preamble of the Act itself states that it is an Act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidental thereto. Thus, it was enacted to efface the then existing rights of the real owners of properties held by others benami. Such an Act was not given any retrospective effect by the legislature. Even when we come to section 4, it is easy to visualise that sub-section (1) of section 4 states that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other shall lie by or on behalf of a person claiming to be the real owner of such property. As per section 4(1) no such suit shall henceforth lie to recover the possession of the property held benami by the defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of section 4(1) that is on 19.5.1988, shall not lie. The legislature in its wisdom has nowhere provided in section 4(1) that on such suit, claim or action pending on the date when section 4 came into force shall not be proceeded with and shall stand abated. On the contrary, clear legislative intention is seen from the words 'no such claim, suit or action shall lie', meaning thereby no such suit, claim or section shall be permitted to be filed or entertained or admitted to the portals of any Court for seeking such a relief after coming into force of section 4(1). In Collins English Dictionary, 1979 edition, as reprinted subsequently, the word 'lie' has been defined in connection with suits and proceedings. At

page 848 of the Dictionary while dealing with topic No.9 under the definition of term 'lie' it is stated as under :

"For an action, claim, appeal, etc., to subsist, be maintainable or admissible".

The word 'lie' in connection with the suit, claim or action is not defined by the Act. If we go by the aforesaid Dictionary meaning it would mean that such suit, claim or action to get any property declared benami will not be admitted on behalf of such plaintiff or applicant against the concerned defendant in whose name the property is held on and from the date on which this prohibition against entertaining of such suit comes into force. With respect, the view taken that section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of section 4(1). It has to be visualised that the legislature in its wisdom has not expressly made section 4 retrospective. Then to imply by necessary implication that section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the section would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act to which we have referred earlier. It is also pertinent to note that section 4(2) enjoins that no such defence 'shall be allowed' in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed, section 4(2) was out of picture. Section 4(2) nowhere uses the words: "No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed to be raised or continued to be raised in any suit". With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit would also get destroyed after coming into operation of section 4(2). As a result of the aforesaid discussion it must be held, with respect, that the Division Bench erred in taking the view that section 4(1) could be pressed in service in connection with suits filed prior to coming into operation of that section. Similarly, the view that u/s 4(2) all suits filed by persons in whose names properties are held, no defence can be allowed at any future stage of the proceedings that the properties are held benami, cannot be sustained. As discussed earlier, section 4(2) will have a limited operation even in cases of pending suits after section 4(2) came into force if such defences are not

already allowed earlier. It must, therefore, be held, with respect, that the decision of this Court in *Mithilesh Kumari's* case does not lay down correct law so far as the applicability of section 4(1) and section 4(2) to the extent hereinabove indicated, to pending proceedings when these sections came into force, is concerned. Accordingly, the question for consideration is answered in the negative.

Cases referred to :

1. *Mithilesh Kumari vs. Prem Behari Khare* (1989) Taxation 93(2) 23, (1989) 177 ITR 97 (SC) overruled
2. *Kithlesh Kumari vs. Prem Behari* (1989) 177 ITR 97 (SC)
3. *Nand Kishore Marwah vs. Samundri Devi* 1987 (4) SCC 382
4. *Athlumney, In re* (1898) 2 QB 551
5. *Garikapati Veeraya vs. N. Subbiah Choudhry* AIR 1957 SC 540

EDITOR'S NOTE

A Division Bench of the Supreme Court in the case of *Mithilesh Kumari vs. Ram Behari Khare* (1989) 177 ITR 97 held that section 4(1) could be pressed in service even in cases filed prior to coming into operation of that section and it had further held that u/s 4(2) in all suits filed by persons in whose names properties are held, no defence could be allowed at any future stage of the proceedings when the properties are held benami. This view of the Division Bench has been overruled in the present case by a three Member Bench of the Apex Court.

Full text of the Judgment is given below :

JUDGMENT

(S.B. Majudan, J.)

In this group of matters a common question arises for our consideration. It is to the following effect whether section 4(1) of the Benami Transaction (Prohibition) Act, 1988 (the Act) can be applied to suit, claim or action to enforce any right in property held benami against person in whose name such property is held or any other person, if such proceeding is initiated by or on behalf of a person claiming to be real owner thereof, prior to the coming into force of section 4(1) of the Act. Section 4 with its relevant sub-sections reads as under :

> "*Prohibition of the right to recover property held benami* - (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
>
> (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against

any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be real owner of such property.

(3) Nothing in this section shall apply -

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity?".

In fact the question is answered in the affirmative by a Division Bench of the Court in *Mithilesh Kumari vs. Prem Behari Khare* (1989) 177 ITR 97. In that case two learned Judges of this Court constituting the Division Bench have taken the aforesaid affirmative view. The correctness of that view came up for consideration before another Division Bench of this Court. That Division Bench by its order dated 10.3.1992 directed that these matters be placed for hearing at the bottom of the miscellaneous list for final hearing on 22.3.1992 before a three-Judge Bench. Ultimately this group of matters came to be placed for final hearing before this Bench.

We have heard the learned counsel for the respective parties on this question. Learned advocates were agreeable that though the order of the Division Bench dated 10-3-1992 has resulted in placing these matters before three-Judge Bench for final hearing, we may after answering the question canvassed before us, send back the matters to the Bench of two learned Judges who can dispose of the same on merits in accordance with law, in the light of answer given by us on the aforesaid question.

In order to appreciate the nature of the controversy posed for our consideration, we may note a few relevant facts leading to these proceedings. In most of the proceedings various suits were filed years back before coming into operation of section 4(1). These proceedings were pending either at the first appeal stage or second appeal stage or in revision before the High Court or in civil appeals before this Court when section 4(1) came into operation. The question is whether these pending proceedings at various stages in the hierarchy can get encompassed by the sweep of section 4(1) and such suits would be liable to be dismissed as laid down by that section.

The learned counsel appearing for the concerned plaintiffs submitted before us that sections 3, 5 and 8 of the Act came into force on 5-9-1988 when the Act received the President's assent and the remaining sections were deemed to have come into force on 19-5-1988 and that prior to the coming into force of the Act and the relevant provisions thereof, litigations were already filed by the parties and they had to be governed by the then existing law which held the field at the time of initiation of these proceedings and

that there is nothing in the Act to indicate that any of the provisions of the Act, including section 4(1), has any retrospective effect. They further contended that even the Division Bench of this Court in *Mitilesh Kumari's* case (supra) has taken the view that section 3(1) is prospective in operation. Under these circumstances, they submitted that it would be inconsistent to hold that though the Act is not retrospective it would apply to all pending proceedings at whatever stage they might be and such proceedings would incur dismissal under section 4(1). They submitted that there was a substantive right in the plaintiff under the existing laws which had sanction of more than a centrary, under which consistently such benami transactions were recognised and could be enforced by Courts of law. That this substantive right is sought to be taken away by section 4(1) and unless there is anything to suggest that it is retrospective in operation, it could not be treated to be retrospective.

The learned counsel appearing for the respondents/defendants on the other hand submitted that even though the Act may not be retrospective, at least to the extent it is roping in all past transactions of benami purchases of properties and when rights arising therefrom are sought to be put to an end by section 4(1) which covers any or every property held benami, there is no reason why the said section cannot apply to such proceedings at any stage till they get finally decided by the highest Court in the hierarchy. If there is any change in law by which any pending litigation becomes incompetent, such change in law can be applied to such pending proceedings at whatever stage they might be pending before higher Courts. In short, they submitted that the decision rendered by Saikia, J in *Mithilesh Kumari's* case (supra) lays down correct law and requires no reconsideration.

Having giving our anxious consideration to these rival contentions, we have reached the conclusion that the question has to be answered in the negative and it must be held that the decision of the Division Bench taking a contrary view does not lay down correct law.

The reasons are these : Under various legal provisions holding the field, prior to the coming into operation of this Act, benami transactions were a recognised specie of legal transactions pertaining to immovable properties. Under the Indian Trusts Act, 1882 almost 113 years back the then Legislature enacting the law laid down in section 82 as under :

> "*Transfer to one for consideration paid by another* — Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.
>
> Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (to improve the law

relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), section 36".

Therefore, it was a legal right of the plaintiff to contend in those days that even though the transfer of the property had been effected in the name of defendant benamidar for the plaintiff from whom the consideration had moved the plaintiff was the real owner and, therefore, the defendant was bound to restore such property to the real owner. If the benamidar took up a defiant attitude then the law provided a substantive right to the plaintiff to come to the Court for getting appropriate declaration and relief of possession on that ground. Various Courts in India over a century used to entertain such suits and such suits on proof of relevant facts used to be decreed. The Legislature, however, in its wisdom considered the question of enacting an appropriate legislation for prohibiting such benami transactions. For that purpose earlier Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988, was promulgated by the President and it was followed by the Act, the different sections of which came into force on the respective dates as mentioned hereinabove. It may also be kept in view that these exercises were undertaken in the light of India Law Commission's 57th Report on benami transaction. This Report was submitted on 7-8-1973 by the Law Commission after studying benami system as operating in India and England. The Law Commission also examined implications of the provisions of the Indian Trusts Act and other statutory modifications of the benami law as contained in the Code of Civil Procedure, 1908, the Transfer of Property Act, 1947, the Indian Penal Code, 1860 and the Income-tax Act, 1961. In that Report, the Law Commission suggested retrospective effect to be accorded to the proposed legislature. 15 years, however, passed and the Parliament did not take any steps in this connection. In the meantime, many more suits concerning benami transactions not only saw the light of the day but also got successfully disposed of. Some of them, however, were pending in first appeals or second appeals or revisions. Then, as noted earlier, on 19-5-1988, the President of India promulgated the Ordinance to prohibit the right to recover property held benami and for matters connected therewith and incidental thereto based on the suggestion of the Law Commission of India. Thereafter, the Law Commission was requested to take up the question of banami transactions for detailed examination and to give its considered views as early as possible so that a Bill to replace the Ordinance could be drafted on the basis of its recommendations and got passed by the Parliament. India Law Commission by its 130th Report on 14-8-1988 recommended passing of appropriate legislation and accordingly the Benami Transactions (Prohibition) Bill, 1988, drafted after getting the Report, was introduced in the Rajya Sabha on 31-8-1988 and the Bill was passed. In para 3.18 of its Report, the Law Commission made the following recommendation in connection with the retrospective operation of the proposed legislation :

"3.18. Therefore viewed from either angle, the Law Commission is of the firm opinion that the legislation replacing the Ordinance should be retrospective in operation and that no *locus penitentia* need be given to the person who had entered into benami transactions in the past. They had notice of one and a half decades to set their house in order. No more indulgence is called for."

It is thereafter that the Act came to be passed by both the Houses of Parliament and came into force as stated above. It might be appreciated that though the Law Commission recommended retrospective applicability of the proposed legislation, the Parliament did not make the Act or any of its sections expressly retrospective in its wisdom. A bird's eye view of the Act clearly establishes this position. The Act being Act No. 45 of 1988 in its preamble states that it is an Act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidential thereto. Section 3 which is the heart of the Act imposes the required prohibition on benami transactions. It reads as under :

"3. *Prohibition of benami transactions*—(1) No person shall enter into any benami transaction.

(2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable."

A mere look at the above provisions shows that the prohibition under section 3(1) is against persons who are to enter into benami transactions and it had laid down that no person shall enter into any benami transaction which obviously means from the date on which this prohibition comes into operation, *i.e.*, with effect from 5-9-1988. That takes care of future benami transactions. We are not concerned with sub-section (2) above, it states that whoever entires into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both. Therefore, the provision creates a new offence of entering into such benami transactions. It is made non-cognizable and bailable as laid down under sub-section (4). It is obvious that when a statutory provision creates new liability and new offence, it would naturally have prospective operation and would cover only those offences which take place after section 3(1) comes into operation. In fact Saikia, J., speaking for the Court in

Mithilesh Kumari's case (supra), has in terms observed at page 635 that section 3 obviously cannot have retrospective operation. We respectfully concur with this part of the learned Judge's view. The real problem centres round the effect of section 4(1) on pending proceedings wherein claim to any property on account of it being held benami by other side is on the anvil and such proceeding had not been finally disposed of by the time. Section 4(1) came into operation, namely, on 19-5-1988. Saikia, J., speaking for the Division Bench in the case of *Mithilesh Kumari* (supra), gave the following reasons for taking the view that though section 3 is prospective and though section 4(1) is also not expressly made retrospective, by the Legislature, by necessary implication, it appears to be retrospective and would apply to all pending proceedings wherein right to property allegedly held benami is in dispute between parties and that section 4(1) will apply at whatever stage the litigation might be pending in the hierarchy of the proceedings :

(1) Section 4 clearly provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be real owner of such property. This naturally relates to past transactions as well. The expression any property held benami is not limited to any particular time, date or duration. Once the property is found to have been held benami, no suit, claim, or action to enforce any right in respect thereof shall lie.

(2) Similarly, sub-section (2) of section 4 nullifies the defences based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. It means that once a property is found to have been held benami the real owner is deprived of such a defence against the person in whose name the property is held or any other person. In other words, in its sweep section 4(2) engulfs past benami transactions also.

(3) When an Act is declaratory in nature, the presumption against retrospectivity is not applicable. A statute declaring the benami transactions to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case inasmuch as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now ceased by the Act. In one sense there was a right to recover or resist in the real owner against the benamidar. *Ubi jus ibi remedium* - where the remedy is barred, the right is rendered unenforceable.

(4) When the law unllifies the defences available to the real owr in recovering the benami property from the benamidar, the must apply irrespective of the time of the benami transactic The expression 'shall lie' under section 4(1) and 'shall be allo in section 4(2), are prospective and shall apply to present (fu stages) and future suits, claims or action only.

(5) The word 'suits' would include appeals and further appeal appeals are in continuation of the suits. This is an aspec procedural law and, therefore, when procedure is changed deciding any such proceedings between the parties the provisi of such procedural law can be applied to such pending proceedi by necessary implication.

(6) Repelling the contention that rights of the parties to a suit wc be determined on the basis of rights available to them on the of filing of the suit and distinguishing the judgment of this C in *Nand Kishore Marwah vs. Samundri Devi* 1987 (4) SCC it was observed that the aforesaid case was for eviction wh the rights of the parties on the date of suit were material un in this case where subsequent legislation has nullified the defen of benami holders.

Before we deal with these six considerations which weighed with the Divis Bench for taking the view that section 4 will apply retrospectively in sense that it will get telescoped into all pending proceedings, howso earlier they might have been filed, if they were pending at different sta in the hierarchy of the proceedings even up to this Court, when sec 4 came into operation, it would be apposite to recapitulate the salient feat of the Act. As seen earlier, the preamble to the Act itself states tha is an Act to prohibit benami transactions and the right to recover prop held benami, for matters connected therewith or incidental thereto. Th it was enacted to efface the then existing rights of the real owner properties held by other benami. Such an Act was not given any retrospec effect by the Legislature. Even when we come to section 4, it is eas visualise that sub-section (1) of section 4 states that no suit, claim or ac to enforce any right in respect of any property held benami against person in whose name the property is held or against any other shall by or on behalf of a person claiming to be the real owner of such prop As per section 4(1) no such suit shall thenceforth lie to recover the possess of the property held benami by the defendant. Plaintiff's right to that ef is sought to be taken away and any suit to enforce such a right after com into operation of section 4(1) that is on 19-5-1988, shall not lie. Legislature in its wisdom has nowhere provided in section 4(1) that no suit, claim or action pending on the date when section 4 came into fc shall not be proceeded with and shall stand abated. On the contrary, c legislative intention is seen from the words 'no such claim, suit or ac

shall lie', meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any Court for seeking such a relief after coming into force of section 4(1). In *Collins English Dictionary,* 1979 edn., as reprinted subsequently, the word 'lie' has been defined in connection with suits and proceedings. At page 848 of the Dictionary while dealing with topic No. 9 under the definition of term 'lie' is stated as under :

> "For an action, claim, appeal, etc., to subsist; be maintainable or admissible."

The word 'lie' in connection with the suit, claim or action is not defined by the Act. If we go by the aforesaid Dictionary meaning it would mean that such suit, claim or action to get any property declared benami will not be admitted on behalf of such plaintiff or applicant against the concerned defendant in whose name the property is held on and from the date on which this prohibition against entertaining of such suit comes into force. With respect, the view taken that section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the fact of the clear language of section 4(1). It has to be visualised that the Legislature in its wisdom has not expressly made section 4 retrospective. Then to imply by necessary implication that section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the section would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act to which we have referred earlier. It is, however, true as held by the Division Bench that on the express language of section 4(1) any right inhering in the real owner in respect of any property held benami would get effaced once section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of section 4(1), and hence, after section 4(1) applied, no suit can lie in respect to such a past benami transaction. To that extent the section may be retrospective. To highlight this aspect we may take an illustration. If a benami transaction has taken place in 1980 and a suit is filed in June 1988 by the plaintiff claiming that he is the real owner of the property and defendant is merely a benamidar and the consideration has flown from him then such a suit would not lie on account of the provisions of section 4(1). Bar against filing, entertaining and admission of such suits would have become operative by June 1988 and to that extent section 4(1) would take in its sweep even past benami transactions which are sought to be litigated upon after coming into force of prohibitory provision of section 4(1); but that is the only effect of the retroactivity of section 4(1) and nothing more than that. From the conclusion that section 4(1) shall apply even to past benami transactions to the aforesaid extent, the next step taken by the Division Bench that

therefore, the then existing rights got destroyed and even though suits by real owners were filed prior to coming into operation of section 4(1) they would not survive, does not logically follow.

So far as section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself suggests that a new liability or restriction is imposed by section 4(2) on a pre-existing right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent to note that section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of section 4(2) is concerned, the prohibition of section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit might have been filed prior to 19-5-1988, if before the stage of filing of defence by the real owner is reached, section 4(2) becomes operative from 19-5-1988, then such a defence, as laid down by section 4(2), will not be allowed to such a defendant. However, that would not mean that sections 4(1) and 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially section 4 thereof. It is also pertinent to note that section 4(2) enjoins that no such defence 'shall be allowed' in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed, section 4(2) was out of picture. Section 4(2) nowhere uses the words :"No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed to be raised or continued to be raised in any suit." With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit would also get destroyed after coming into operation of section 4(2). We may at this stage refer to one difficulty projected by the learned advocate for the respondents in his written submissions, on the applicability of section 4(2). These submissions read as under :

"Section 4(1) places a bar on a plaintiff pleading 'benami', while section 4(2) places a bar on a defendant pleading 'benami', after the coming into force of the Act. In this context, it would be anomalous if the bar in section 4 is not applicable if a suit pleading 'benami' is already filed prior to the prescribed date, and it is treated as applicable only to suit which he filed thereafter. It would have the effect of classifying the so-called 'real' owners into two classes - those who stand in the position of plaintiffs and those who stand in the position of defendants. This may be clarified by means of an illustration. A and B are 'real' owners who have both purchased properties in say 1970, in the names of C and D respectively who are ostensible owners, *viz.*, benamidars. A files a suit in February 1988, *i.e.*, before the coming into force of the Act against C, for a declaration of his title saying that C is actually holding it as his benamidar. According to the petitioner's argument, such a plea would be open to A even after coming into force of the Act, since the suit has already been laid. On the other hand, if D files a suit against B at the same time for declaration and injunction, claiming himself to be the owner but B's opportunity to file a written statement comes in say November 1988 when the Act has already come into force, he in his written statement cannot plead that D is a benamidar and that he, B is the real owner. Thus A and B, both 'real' owners, would stand on a different footing, depending upon whether they would stand in the position of plaintiff or defendant. It is respectfully submitted that such a differential treatment would not be rational or logical."

According to us, this difficulty is inbuilt in section 4(2) and does not provide the rationale to hold that this section applies retrospectively. The Legislature itself thought it fit to do so and there is no challenge to the vires on the ground of violation of article 14 of the Constitution. It is not open to us to re-write the section also. Even otherwise, in the operation of sections 4(1) and 4(2), no discrimination can be said to have been made amongst different real owners of property, as tried to be pointed out in the written objections. In fact, those cases in which suits are filed by real owners or defences are allowed prior to coming into operation of section 4(2), would form a separate class as compared to those cases where a stage for filing such suits or defences has still not reached by the time sections 4(1) and 4(2) start operating. Consequently, latter type of cases would form a distinct category of cases. There is no question of discrimination being meted out while dealing with these two classes of cases differently. A real owner who has already been allowed defence on that ground prior to coming into operation of section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and in the meantime he is hit by the prohibition of section 4(2). Equally, there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till section 4(1) comes into

operation. All real owners who stake their claims regarding benami transactions after sections 4(1) and 4(2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Consequently, the grievances raised in this connection cannot be sustained.

At this stage, we may also usefully refer to section 7(1) of the Act which lays down that sections 81, 82 and 94 of the Indian Trusts Act, section 66 of the Code of Civil Procedure, and section 281A of the Income-tax Act, are thereby repealed. We have already seen section 82 of the Indian Trusts Act which gave almost for a period of a century or more a legal right to the real owner to claim against the purported owner that the consideration paid was by the real owner and the transferee held the property for the benefit of the person paying consideration for supporting the transaction. It is this right which got destroyed by section 7 with effect from 19-5-1988. If any suits or proceedings were pending prior to that date, invoking section 82 of the Indian Trusts Act, what is to happen to such suits is no answered by section 4(1) or by any other provisions of the Act. We have, therefore, to turn to the General Clauses Act, for finding out an answer. Section 6 of the General Clauses Act lays down :

> "6. *Effect of repeal* — Where this Act, or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
>
> (d) after any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

It becomes, therefore, obvious that the Act by section 7 has effected a repeal of section 82 of the Indian Trusts Act and while repealing this provision no different intention appears from the Act to affect any right, privilege or liability acquired under section 82 by either side or any pending proceedings regarding such obligation or liability. Therefore, such pending proceedings

will have to be continued or enforced as if the repealing Act had not been passed. A conjoint reading of section 82 of the Indian Trust Act and section 6 (b), (d) and (e) of the General Clauses Act clearly enjoins that if suits are pending wherein the plaintiffs have put forward claims under the then existing section 82 of the Indian Trusts Act such proceedings are to be continued by assuming that the repealing of section 82 has not been effected in connection with such pending proceedings. Unfortunately, this aspect was not pressed for consideration before the Division Bench and, therefore, the view taken by the Division Bench is likely to result in an incongruous situation if a view is to be taken that a pending suit wherein plaintiff might have contended that the real consideration flowed from him and the defendant was not the real owner and held the property benami as per section 82 of the Indian Trusts Act, has to be continued by ignoring the present Act, it will be inconsistent with the conclusion reached by the Division Bench. As per the Division Bench, such suits must necessarily be dismissed at whatever stage they might be pending between the parties. Therefore, interpretation of section 4(1) by the Division Bench would directly conflict with the legislative scheme emanating from section 82 of the Indian Trusts Act read with section 6 of the General Clauses Act discussed above. Even otherwise, it is now well-settled that where a statutory provision which is not expressly made retrospective by the Legislature seeks to affect vested rights and corresponding obligations of parties, such provision cannot be said to have any retrospective effect by necessary implication. In *Maxwell on the Interpretation of Statutes*, 12th edn. (1969), the learned author has made the following observations based on various decisions of different Courts, specially in *Athlumney, In re* (1898) 2 QB 551 at pp. 551, 552:

> "...Perhaps no rule of construction is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. The rule has, in fact, two aspects, for it, 'involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary'." (p. 216)

In the case of *Garikapati Veeraya vs. N. Subbiah Choudhary* AIR 1957 SC 540 in para 25 Chief Justice, S.R. Das, speaking for this Court, has made the following pertinent observations in this connection :

> "...The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed ..." (p. 553)

We have already discussed earlier that there is nothing in the Act to show that sections 4(1) and 4(2) have to apply retrospectively to all pending proceedings wherein such a right is sought to be exercised by the plaintiff or such a defence has already got allowed to the concerned defendant. As a result of the aforesaid discussion, it must be held that reason Nos. 1 and 2 which weighed with the Division Bench are not well sustained.

As regards reason No. 3, we are of the considered view that the Act cannot be treated to be declaratory in nature. Declaratory enactment declares and clarifies the real intention of the Legislature in connection with an earlier existing transaction or enactment, it does not create new rights or obligations. On the express language of section 3, the Act cannot be said to be declaratory but in substance it is prohibitory in nature and seeks to destroy the rights of the real owner *qua* properties held benami and in this connection it has taken away the right of the real owner both for filing a suit or for taking such a defence in a suit by benamidar. Such an Act which prohibits benami transactions and destroys rights flowing from such transactions as existing earlier, is really not a declaratory enactment. With respect, we disagree with the line of reasoning which commended to the Division Bench. In this connection, we may refer to the following observations in *Principles of Statutory Interpretation,* 5th edn., 1992, by Shri G.P. Singh, at page 315 under the caption 'Declaratory Statutes' :

> "The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court : 'For modern purpose a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'. But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well-settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when

the pre-amended provisions was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force the amendng Act also will be part of the existing law.

In *Mithilesh Kumari vs. Prem Bihari Khare*, section 4 of the Benami Transactions (Prohibition) Act, 1988 was, it is submitted, wrongly held to be an Act declaratory in nature for it was not passed to clear any doubt existing as to the common law or the meaning or effect of any statute. The conclusion, however, that section 4 applied also to past benami transactions may be supportable on the language used in the section."

No exception can be taken to the aforesaid observations of learned author which in our view can certainly be pressed in service for judging whether the impugned section is declaratory in nature or not. Accordingly, it must be held that section 4 or for that matter the Act as a whole is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transactions and for whom new liabilities are created by the Act.

Qua reason No. 4, we may refer to our discussion earlier that the words 'no suit shall lie' as found in section 4(1) and 'no defence based on rights in respect of property shall be allowed'as found in section 4(2) have limited scope and operation and consequently this consideration also cannot have any effect on the conclusion which can be reached in this case. As to reason No. 5, it is observed that even though suit may include appeal and further appeals in the hierarchy, at different stages of the litigation, sections 4(1) and 4(2) cannot be made applicable to these subsequent stages as already seen by us earlier. Otherwise, they would cut across the very scheme of the Act.

As to reason No. 6, relating to nullification of all the defences of benami holders, we say with respect that according to us, as already discussed future defences of real owners against benamidar holders have been nullified as are covered by the sweep of section 4(2) and not others.

As a result of the aforesaid discussion it must be held, with respect, that the Division Bench erred in taking the view that section 4(1) could be pressed in service in connection with suits filed prior to coming into operation of that section. Similarly, the view that under section 4(2) in all suits filed by persons in whose names properties are held, no defence can be allowed at any future stage of the proceedings that the properties are held benami, cannot be sustained. As discussed earlier, section 4(2) will have a limited operation even in cases of pending suits after section 4(2) came into force if such defences are not already allowed earlier. It must, therefore, be held,

with respect, that the decision of this Court in *Mithilesh Kumari's* case (supra) does not lay down correct law so far as the applicability of section 4(1) and section 4(2) to the extent hereinabove indicated, to pending proceedings when these sections came into force, is concerned. Accordingly, the question for consideration is answered in the negative. Registry will now place all these matters before an appropriate Division Bench for disposing them of on merits in the light of the answer given by us.

(1995) 126 Taxation 393 (SC)

IN THE SUPREME COURT OF INDIA

(Before Hon'ble Mr. Justice J.S. Verma,
Hon'ble Mr. Justice N.P. Singh
and Hon'ble Mr. Justice M.K. Mukherjee)

Civil Appeal Nos. 1455-57 of 1976

Commissioner of Income-tax

vs.

Patel Brothers & Co. Ltd.

Decided on : 9-5-1995

BUSINESS EXPENDITURE — Entertainment expenses — Assessee incurring expenditure on providing meals to up-country customers — Expenditure disallowed by ITO — AAC holding expenses not lavish, a bare necessity and allowing the same — Tribunal confirming order of AAC — High Court agreeing with the order of Tribunal — Held, expenses incurred prior to insertion of *Explanation* 2 to sub-section (2A) retrospectively w.e.f. 1-4-1976 allowable and not in the nature of entertainment expenses.

Income-tax Act, 1961 — Section 37(2A).

Explanation I & II to sub-section (2A) of section 37.

FACTS

The relevant A.Ys. are 1969-70 to 1971-72. The assessee is a limited company and it incurred expenses of Rs. 22,301, 25,979 and 28,620 respectively in providing meals to its employees and its customers in ordinary course of business as customary trade usage. The ITO allowed part of the expenses but the AAC held that meals were bare necessity having regard to the business and, therefore, allowable. The decision of the AAC was confirmed by Tribunal. Being aggrieved, the revenue filed reference before the High Court who also agreed with the views of the Tribunal. Being aggrieved, the revenue filed appeal before the Supreme Court.

DECISION

It was argued on behalf of the revenue that even serving ordinary meals

falls under sub-section (2A) of section 37 and the expression "entertainment expenditure" under sub-section (2A) must be construed to mean from the inception as defined in *Explanation* II to sub-section (2A) of section 37, since *Explanation* 2 is merely clarificatory. It was therefore, argued that the insertion of *Explanation* 2 w.e.f. 1-4-1976 is immaterial. The question involved in these matters relates to deduction of expenditure incurred in providing ordinary meals and refreshments to the outstation customers according to the customary hospitality and trade usage satisfying the general test of commercial expediency. Generally, 'entertainment' is an expression of wide import. However, in the context of disallowance of 'entertainment expenditure' as a business expenditure by virtue of sub-section (2A) of Section 37, the word 'entertainment' must be construed strictly and not expansively. Ordinarily, 'entertainment connotes something which may be beneficial for the metal or physical well being but is not essential or indispensable for human existence. A bare necessity, like ordinary meal, is essential or indispensable and, therefore, is not 'entertainment'. If such a bare necessity is offered by another, it is hospitality but not entertainment. Unless the definition of 'entertainment' includes hospitality, the ordinary meaning of 'entertainment' cannot include hospitality. For this reason, the expenditure incurred in extending customary hospitality by offering ordinary meals as a bare necessity is not 'entertainment expenditure' without the aid of the enlarged meaning given to the words by *Explanation* 2 w.e.f 1-4-1976. The object of sub-section (2A) is to disallow any lavish expenditure in the form of business expenditure. This is obvious from the several amendments made in the provision from time to time. It is so understood even in the circular issued by the Board. The object of the provision clearly is to allow deduction of the essential business expenditure incurred due to commercial expediency and according to the trade usage excluding the lavish expenditure. The dispute in the present cases relates only to the amount which has been held to be essential business expenditure of this kind incurred in providing ordinary meals as bare necessity. In the view taken by us, such expense did not come within the meaning of 'entertainment expenditure' prior to 1-4-1976 when *Explanation* 2 was brought in by a retrospective amendment made in 1983 of sub-section (2A) of section 37. The finding of fact in all cases, therefore, satisfies this test to allow deduction of the expenditure incurred by each assessee and claimed under this head for the period prior to 1-4-1976. Sub-section (2A) was inserted w.e.f. 1-10-1967 by the Taxation Laws (Amendment) Act, 1967 and *Explanation* 2 inserted therein by Finance Act, 1983 retrospectively w.e.f 1-4-1976 while sub-section (2B) was inserted w.e.f 1-4-1970 by the Finance Act, 1970. As earlier stated, these cases relate to the period to 1-4-1976 from which date *Explanation* 2 to sub-section (2A) was inserted retrospectively. We have therefore, to consture sub-section (2A) as it existed without the *Explanation* 2. The meaning of *Explanation* 2 is quite clear and it has enlarged the

meaning to widen the tax net. The Hon'ble Court, therefore, held that th decision taken by Gujarat High Court was the correct view *Explanatio* 2 added to Section 37(2A) could not be said only to be clarificatory bu had definitely enlarged the definition of the word entertainment. The appea was thus decided in favour of the assessee and against the revenue.

Cases referred to :

1. *CIT vs. Patel Bros. & Co. Ltd.* (1977) 106 ITR 424 (Guj.)
2. *CIT vs. Rajasthan Mercantile Co. Ltd. etc. etc.* (1995) 211 ITR 4((Raj.)
3. *Brij Raman Das & Sons vs. CIT* (1976) 104 ITR 541 (All.)

Full text of the Judgment is given below :

JUDGMENT

(J.S. Verma, J.)

These appeals and the connected matters involve for decision the commc question of law relating to the meaning of "entertainment expenditure in Section 37(2A) of the Income-tax Act, 1961 (hereinafter referred to "the Act") during the relevant assessment years. The decision of the Gujar High Court in *Commissioner of Income-tax, Gujarat vs. Patel Brother & Co. Ltd.* (1977) 106 ITR 424 (Guj.), on this point is challenged by th revenue in these appeals by a certificate granted under Section 261 of th Act. The connected matters involve the same point. All cases relate to th period prior to 1-4-1976 from which date only *Explanation* 2 inserted sub-section (2A) of Section 37 by the Finance Act, 1983 was applie retrospectively, even though sub-section (2A) was inserted w.e.f 1-10-196 by Taxation Laws (Amendment) Act, 1967.

The material facts in these appeals illustrative of all connected matters, ar these : The relevant assessment years are 1969-70, 1970-71 an 1971-72 of which the corresponding previous years ended on Septemb 30, 1968, September 30, 1969 and September 30, 1970 respectivel The assessee, a limited company, claimed kitchen expenses of Rs. 22,30 Rs. 25,979 and Rs. 28,620 respectively for these assessment years expenses incurred for providing meals to its employees and its customer in the ordinary course of its business as customary trade usage. The Income tax Officer disallowed the expenditure to the extend of Rs. 10,10 Rs. 12,979 and Rs. 17,305 respectively corresponding to the expense incurred for meals provided to the customers even though it was found tha the meals were ordinary and not in any manner lavish. The assessee preferre an appeal to the Appellate Assistant Commissioner against the partia disallowance of this expenditure. The Appellate Assistant Commissione held that the meals were bare necessity having ragard to the nature business and, therefore, the Income-tax Officer was directed to grant tha allowance. The matter then went in appeal to the Tribunal which confirme

the order of the Appellate Assistant Commissioner. At the instance of the revenue, the Tribunal referred to the High Court for its decision two questions of law, namely,

(1) Whether, on the facts and in the circumstances of the case, the expenditure in question was in the nature of entertainment expenditure in law ?

(2) Whether, on the facts and in the circumstances of the case, the expenditure in question would be allowable only to the limited extent of Rs. 5,000/- under section 37(2A) of the Income-tax Act, 1961, for each of the assessment years under reference ?

Identical questions of law were referred for all the three assessment years.

The High Court answered both the questions in the negative since it was found on the facts by the Tribunal that indisputably the up country constituents of the assessee came to Ahmedabad for the purpose of business with the assessee and having regard to the nature and magnitude of the business of the assessee, it would be necessary for the assessee to make arrangements to provide meals to them while in Ahmedabad for business with it, as it was not revenue's case that the assessee had spent the money for throwing lavish parties for its constituents. It had been found that the expenditure was for serving ordinary meals as a bare necessity of the business. Accordingly, the references were answered against the revenue and in favour of the assessee. These appeals are by certificate against the decision. The same question is involved for decision in the connected matters.

There is a conflict in the view taken by the High Courts on the main question. The view taken by the High Courts of Andhra Pradesh, Rajasthan, Madhya Pradesh and Karnataka is the same as that of the Gujarat High Court. The contrary view has been taken by the High Courts of Allahabad, Punjab & Haryana, Patna and Kerala. The decision of the Delhi High Court in *Commissioner of Income-tax vs. Rajasthan Mercantile Co. Ltd. etc. etc.*, (1995) 211 ITR 400 is in line with the Gujarat view. The difference in the views taken by different High Courts has led to one set of decisions against the revenue and another set in its favour. This is how in this Court some appeals and other matters are by the revenue while the rest are by the assessees. As earlier stated, all these matters relate to the period prior to 1-4-1976 and, therefore, the decision is to be based on sub-section (2A) of section 37 of the Act minus *Explanation* 2 inserted later. We would refer to the two sets of decisions after mentioning the rival contentions and the view taken by us.

The contention of Shri B.B. Ahuja, learned counsel for the revenue is that all kinds of hospitality is entertainment and, therefore, the entire expenditure incurred under this head, even for serving ordinary meals as a bare necessity, falls under sub-section (2A) of Section 37; and the expression "entertainment expenditure" in sub-section (2A) must be construed to mean from the

inception as defined in *Explanation* 2 to sub-section (2A) of Section 37, since *Explanation* 2 is merely clarificatory. It was urged that for this reason insertion of *Explanation* 2 only w.e.f 1-4-1976 is immaterial and the expression "entertainment expenditure" in sub-section (2A) of Section 37 must be so construed even for the period prior to 1-4-1976. In reply, Shri Harish Salve, learned counsel for the assessee contended that purposive interpretation of the provision must be made. It was urged that the purpose was to curb the tendency of incurring lavish expenditure and not customary hospitality extended by offering ordinary meals as a bare necessity since the traditional meaning of every hospitality is not entertainment. It was urged that the finding in all these cases was that the allowance claimed was only in respect of the expenditure incurred in providing ordinary meals as a bare necessity and not any lavish food.

Section 37, to the extent material, is as under :

"37. General - (1) *Any expenditure* (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

(2) Notwithstanding anything contained in sub-section (1), *no expenditure in the nature of entertainment expenditure shall be allowed* in the case of a company, which exceeds the aggregate amount computed as hereunder:-

xxx xxx xxx

*(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), *no allowance shall be made in respect of so much of the expenditure in the nature of entertainment expenditure* incurred by an assessee during any previous year which expires after the 30th day of September, 1967, as is in excess of the aggregate amount computed as hereunder :-

xxx xxx xxx

Explanation 1.....

*****Explanation 2* - For the removal of doubts, it is hereby declared that for the purposes of this sub-section and sub-section (2B), as it stood before the 1st day of April, 1977, "entertainment expenditure" includes expenditure on provision of hospitality of every kind by the assessee to any person, whether by way of provisions of food or beverages or in any other manner whatsoever and whether or not such provision is made by reason of any express or implied contract or custom or usage of trade, but does not include expenditure on food or beverages provided by the assessee to his employees in office, factory or other place of their work.

**(2B) Notwithstanding anything contained in this section, no allowance shall be made in respect of expenditure in the nature of entertainment expenditure incurred within Indias by any assessee after the 28th day of February, 1970."

(emphasis supplied)

*Sub-section (2A) was inserted w.e.f. 1st October, 1967 by the Taxation Laws (Amendment) Act, 1967.

**Sub-section (2B) was inserted w.e.f. 1st April, 1970 by the Finance Act, 1970.

****Explanation 2* was inserted by the Finance Act, 1983 retrospectively w.e.f. 1-4-1976.

In Sampath Iyengar's Law of Income-tax , 8th Ed., Vol. 2, reference is made to circular No. 372 dated December, 8, 1983 of the Board, (1984) 146 ITR St 31, wherein the scope and effect of the above amendments was explained as under :-

"*Provision for curbing avoidable or ostentatious expenditure in business or profession — Section 37 - 30.* Section 37 of the Income-tax Act provides for deduction in the computation of taxable profits of any expenditure other than expenditure of the nature described in sections 30 to 36 and section 80VV, or expenditure in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of the business or profession carried on by the taxpayer. With a view to cubing certain categories of avoidable or ostentatious expenditure by assessees carrying on business or profession, the Finance Act has made certain amendments to section 37 of the Income-tax Act. The substance of these amendments is explained in paragraphs 31 to 34 hereunder.

Entertainment expenditure — 31.1 For the removal of doubts regarding the scope of the expression "entertainment expenditure", the Finance Act has inserted a new *Explanation* for the purposes of sub-section (2A) of section 37 and also sub-section (2B) of that section as that sub-section stood before 1 April, 1977. The *Explanation* clarifies that "entertainment expenditure" includes expenditure on provision of hospitality of every kind by the assessee to any person, whether by way of provision of food or beverages or in any other manner whatsoever and whether or not such provision is made by reason of any express or implied contract or custom, usage of trade. However, expenditure incurred in providing food or beverages by an employer to his employee in office, factory or other place of their work will not be regarded as entertainment expenditure.

31.2. This amendment takes effect retrospectively from 1 April, 1976, and will, accordingly, apply in relation to the assessment year 1976-77 and subsequent years.

31.3 Under this existing provisions of section 37(2A) of the Income-tax

Act, deduction in respect of expenditure on entertainment is subject to certain limits calculated with reference to the quantum of profits as under:-

xxx xxx xxx"

(at page 2255)

In the Income-tax Act, 1961, Chapter IV contains provisions relating to computation of total income wherein Section D containing Sections 28 to 44D pertains to profits and gains of business or profession. Section 28 specifies the income which is chargeable to income tax under the head "profits and gains of business or profession". Section 29 says that the income referred to in Section 28 shall be computed in accordance with the provisions contained in section 30 to 43D. Sections 30 to 36 provide for deduction of certain expenditures incurred for the purposes of business or profession. The comes Section 37 which contains the general provision permitting deduction of "any expenditure...laid out or expended wholly and exclusively for the purposes of the business or profession...in computing the income chargeable under the head "Profits and gains of business or profession", by sub-section (1). Sub-section (2) therein begins with a non-obstante clause to exclude from the ambit of sub-section (1) the entertainment expenditure by saying that "no expenditure in the nature of entertainment expenditure shall be allowed" in the case of a company which exceeds the specified amount. Similar provision is made in sub-section (2A) for any assessee. In other words, the general provision in Section 37 is that any expenditure laid out or expended wholly or exclusively for the purposes of the business or profession shall be allowed but no expenditure in the nature of the entertainment shall be allowed as stated in sub-sections (2) and (2A) in excess of the amount specified. For claiming deduction of the business expenditure according to the general rule, the test of commercial expediency is applied but exclusion is made of any expenditure which is in the nature of "entertainment expenditure". Without anything more, it means that an expenditure incurred for commercial expediency or usage of the trade is a permissible deduction unless it partakes the character of an entertainment expenditure, in which case the permissible limit is specified. The controversy in the present case relates to the meaning of "entertainment expenditure" in sub-section (2A) of Section 37 before insertion of *Explanation 2* therein.

The question involved in these matters relates to deduction of expenditure incurred in providing ordinary meals and refreshments to the outstation customers according to the customary hospitality and trade usage satisfying the general test of commercial expediency.

Generally, "entertainment expenditure" is an expression of wide import. However, in the context of disallowance of "entertainment expenditure" as a business expenditure by virtue of sub-section (2A) of Section 37, the word "entertainment" must be construed strictly and not expansively. Ordinarily, "entertainment" connotes something which may be beneficial

for the mental or physical well being but is not essential or indispensable for human existence. A bare necessity, like ordinary meal, is essential or indispensable and, therefore is not "entertainment. If such a bare necessity is offered by another, it is hospitality but not entertainment. Unless the definition of "entertainment" includes hospitality, the ordinary meaning of "entertainment" cannot include hospitality. For this reason, the expenditure incurred in extending customary hospitality by offering ordinary meals as a bare necessity, is not "entertainment expenditure" without the aid of the enlarged meaning given to the words by *Explanation* inserted w.e.f. 1-4-1976. The definition in *Explanation* 2 is not the ordinary meaning of the words "entertainment expenditure", but the enlarged meaning given for the purposes of the Act w.e.f 1-4-1976.

The object of sub-section (2A) is to disallow any lavish expenditure in the form of business expenditure. This is obvious from the several amendments made in the provision from time to time. It is understood even in the circular issued by the Board. The object of the provision clearly is to allow deduction of the essential business expenditure incurred due to commercial expediency and according to the trade usage excluding the lavish expenditure. The dispute in the present cases relates only to the amount which has been held to be essential business expenditure of this kind incurred in providing ordinary meals as bare necessity. In the view taken by us, such expense did not come within the meaning of "entertainment expenditure" prior to 1-4-1976 when *Explanation 2* was brought in by a retrospective amendment made in 1983 of sub-section (2A) of Section 37. The finding of fact in all cases, therefore, satisfies this test to allow deduction of the expenditure incurred by each assessee and claimed under this head for the period prior to 1-4-1976.

Sub-section (2A) was inserted w.e.f. 1st October, 1967 by the Taxation Laws (Amendment) Act, 1967 and *Explanation 2* inserted therein by Finance Act, 1983 retrospectively w.e.f. 1-4-1976 while sub-section (2B) was inserted w.e.f 1st April, 1970 by the Finance Act, 1970. As earlier stated, these cases relate to the period prior to 1-4-1976 from which date *Explanation 2* to sub-section (2A) was inserted retrospectively. We have therefore, to construe-sub-section (2A) as it existed without the *Explanation 2* . The meaning of *Explanation* 2 is quite clear and it has enlarged the meaning to wide the tax net.

Learned counsel for the revenue contended that *Explanation 2* is clarificatory and, therefore, even without *Explanation 2* the provision must be understood and construed in the same manner. It appears to us that insertion of *Explanation 2* made retrospectively but restricted in its application only w.e.f 1-4-1976 is itself an indication that its application prior to 1-4-1976 is excluded. If *Explanation 2* was merely clarificatory of the ordinary meaning, as contended by learned counsel for the revenue, it was unnecessary to restrict its retrospective application in this manner only from

1-4-1976. The construction we have made of sub-section (2A) of Section 37 as it existed during the relevant assessment period cannot, therefore, be affected by Explanation 2 to sub-section (2A) which was inapplicable during the relevant period.

In our opinion, the construction we have made of the provision as it existed during the relevant period flows not merely from the language of the provision but also matches with the object thereof. It means that the expenditure incurred by the assessees in providing ordinary meals to the outstation customers according to the established business practices, was a permissible deduction inspite of sub-section (2A) of Section 37, to which the assessees were entitled in the computation of their total income for the purpose of payment of tax under the Income-tax Act, 1961 during the relevant period prior to 1-4-1976.

We shall now refer briefly to the conflicting decisions of the several High Courts on the point. Amongst the decisions in favour of the revenue is *Brij Raman Dass and Sons vs. Commissioner of Income-tax, Lucknow* (1976) 104 ITR 541 of the Allahabad High Court which has been referred and followed in subsequent decisions of other High Courts taking the view in favour of the revenue. In this line of cases are the decisions of the High Courts of Punjab & Haryana, Patna and Kerala. The other line of cases wherein the view taken is in favour of the assessee are the decisions of the High Courts of Gujarat, Andhra Pradesh, Madya Pradesh, Rajasthan and Karnataka. The main decision of the Gujarat High Court is *Commissioner of Income-tax Gujarat II vs. Patel Brothers & Co. Ltd.*, (1977) 106 ITR 424 which has been referred and followed in the later decisions in that line.

We would first deal with the decision of the Allahabad High Court reported in (1976) 104 ITR 541 which is under appeal in Civil Appeal No. 1850 of 1975 and the decision of the Gujarat High Court reported in (1977) 106 ITR 424 which is under appeal in Civil Appeal Nos. 1455-57 of 1976. In *Brij Dass & Sons* (supra), it was held that sub-section (2A) of Section 37 is not an independent provision but is a proviso to sub-section (1) of Section 37 since the expenditure falling under sub-section (2A) must necessarily come within sub-section (1). Thereafter, while considering the meaning of "entertainment" in this context, it was held as under :-

> "...what we have to see is as to what is the meaning of the word "entertainment" for purposes of section 37(2A) of the Act. In the Income-tax Act, this word has not been defined and we will have to given it its general meaning. An "entertainment expenditure" would, in our opinion, include all expenditures incurred in connection with business on the entertainment of customer and constituents. The entertainment may consist of providing refreshments as in this case or it may consist of providing some other sort of entertainment.

In *Bentleys, Stokes & Lowless vs. Beeson (H.M. Inspector of Taxes)*, (1952) 33 TC 491 (CA), a firm of solicitors incurred expenses in entertaining clients. The entertainment consisted of providing lunch to the clients. It was held that expenditure was incurred wholly and exclusively for purposes of business and was an allowable deduction. The same is the position in the instant case. The petitioner has been providing to its customers refreshments and this constitutes an expenditure in the nature of "entertainment expenditure". The entire expenditure would have been allowed but for the amendment introduced by section 37(2A) which restricts the allowance of such an expenditure to a maximum limit of Rs. 5,000/-."

There is no more discussion on the point in this decision.

On the other hand, the Gujarat High Court in *Patel Brothers & Co. Ltd.* (supra) took a different view. In this decision, certain broad tests or guidelines have also been indicated to determine the nature of expenses allowed as entertainment expenses. In our opinion, that exercise is unnecessary since the broad test indicated by us is the only thing which can safely be indicated and the determination of the question in each case is one of fact. The conclusion on the basis of the finding of fact recorded therein was stated thus :

"...The Tribunal has agreed with the Appellate Assistant Commissioner who has found that it was customary for the assessee due to very long-established tradition that farmers who come to deliver the goods, i.e..cotton, groundnuts, rice, pulses, were given meals from the kitchen run by the assessee and if the assessee failed to give this normal courtesy, it apprehended that the farmers might offer their produce to other competitors in the field of the assessee and the assessee would loss the goods. The Appellate Assistant Commissioner has also found that the expenditure was for serving ordinary meals to the employees as well as to the farmer customers and they were not such which entertained or amused the guests since the assessee provided served meals as a bare necessity of the business. In that view of the matter, therefore, these references must be rejected and we answer the questions referred to us in the negative and against the Commissioner..."

This conclusion of the Gujarat High Court on the finding of fact recorded by the Tribunal is consistent with the view we have taken and, therefore, we uphold the same for the reasons given by us which are sufficient to sustain the ultimate view. We may observe that the wide observations and the elaborate guidelines given in the Gujarat decision which are in excess of the broad test indicated by us and not necessary to support the conclusion, are unnecessary for the decision and, therefore, affirmance of the conclusion reached in the Gujarat decision should not be construed as an affirmance of the wide observations therein.

We may now refer to the decision of the Delhi High Court in *Commissioner of Income-tax vs. Rajasthan Mercantile Co. Ltd. etc. etc.* (1995) 211 ITR 400. The true effect of *Explanation* 2 added in sub-section (2A) of Section 37 of the Act has been correctly understood therein as under :

> "The declaration and the clarification involved in *Explanation 2*, are only for the purposes of assessments with effect from April 1, 1976. This provision widens the concept of "entertainment expenditure" by including in its scope such of the expenditures which are otherwise traditionally understood as routine business expenditures incurred in connection with "business-hospitality". Therefore, the widened meaning cannot be extended to past periods when the amended *Explanation* 2 was not in operation."

We approve the above view which accords with the construction made by us of the provision.

In the view we have taken, the contrary view of the Allahabad High Court in *Brij Raman Dass and Sons*, (1976) 104 ITR 541, cannot be accepted to be correct and so also the decisions of the different High Courts which have taken the same view. Accordingly, the decision of the Allahabad High Court and the other decisions of different High Courts taking that view are to be treated as overruled.

Consequently, all these matters are decided in favour of the assessees and against the revenue with the result that the appeals of the assessees are allowed while the appeals, SLPs and Tax References by the revenue are dismissed. No costs.

(1995) 126 Taxation 403 (Guj.)

IN THE HIGH COURT OF GUJARAT

(Before Hon'ble Mr. Justice G.T. Nanavati & Hon'ble Mr. Justice S.D. Dave)

IT Reference No. 71 of 1980

Bhavnagar Bone & Fertilizer Co. (P) Ltd.

vs.

Commissioner of Income-tax

For the Appellant	:	**D.A. Mehta, R.K. Patel & K.C. Patel**
For the Respondent	:	**B.J. Shelat & R.P. Bhatt**
Decided on	:	16-10-1992

PAYMENT OF BONUS — Assessee paying bonus in excess of Bonus Act — No agreement with the labour — Excess bonus paid as a gesture of goodwill — Board holding meeting sanctioning bonus after the accounting year — Held, no liability accrued during the year — Board meeting held after the close of the company

year — No statutory liability for payment of excess bonus — Excess bonus rightly disallowed.

Income-tax Act, 1961 — Section 36 (1) (ii).

FACTS

The facts are that the assessee which is a private limited company in which the public are not substantially interested, carried on the business of purchase and sale of crushed bones. The question was in respect of the disallowance of the bonus in sum of Rs.15,178/-. It was on one hand claimed by the assessee company before the revenue that the deduction of the bonus payment of Rs.22,656/- should be allowed. The ITO had, on the other hand, found that the total salary paid to the employees to whom the bonus was paid in excess of 20% which was not covered by an agreement between the employer and the employees and which was not authorised by the conditions of service. Examining the details the Board of Directors of the company had sanctioned the bonus at 50% of the salary for the accounting year 1973-74 at their meeting held on 5.6.1974. A similar payment was also authorised for the subsequent year at the meeting which was held on 24.6.1975. It was contended on the above said basis before the ITO at the assessment stage that there was no justification in applying the ceiling prescribed under provisions of section 36(1)(ii) of the Act. The frontline stand taken by the revenue all along was that the excess payment was not allowable as the expenditure incurred in the course of the business. The amount of bonus, according to the taxing authorities, was sanctioned at the meeting of the Board of Directors held on 5.6.1974, while the assessee's previous year had ended on 31.3.1974. It was the say of the revenue that there was no subsisting liability on the part of the assessee to make the payment of bonus in excess of the limits prescribed under the provisions. According to the Tribual, if during the previous year relevant to the A.Y. under appeal, there was no obligation, either statutory or contractual or otherwise, and if the liability was not ascertained at the end of the previous year, the claim for deduction of excess amount of bonus would not be permissible.

DECISION

The Hon'ble Court held that the Tribunal has accepted that, if during the previous year relevant to the A.Y. under appeal there was no obligation either statutory or contractual or otherwise, and if the liability was not ascertained at the end of the previous year, the claim of deduction of the excess amount of bonus would not be permissible. The Hon'ble Court held that they were not inclined to take a different view. Moreover, it should not be overlooked that the bonus which should be deducted must be deducted qua the previous year and that, when the Board meeting sanctioned the payment of bonus at a higher rate, after the close of that particular year.

By so stretch of imagination can it be said that there was an existing liability or a crystallised liability to pay the bonus during the relevant year. The Hon'ble Court held that the Tribunal was justified in law in confirming the disallowance of the bonus amount of Rs. 15,178/- and further holding that the liability of the bonus was not referable to the year under reference.

Cases referred to :

1. *CWT vs. Sayaji Mills Ltd.* (1974) 94 ITR 54 (Guj)
2. *Metal Box Co. of India Ltd. vs. Their Workmen* (1969) 73 ITR 53 (SC)
3. *CIT vs. A. Krishnaswami Mudaliar* (1964) 53 ITR 122 (SC)

Full text of thed Judgment is given below :

JUDGEMENT

(S.D. Dave, J.)

The Tribunal, Ahmedabad Bench, 'A', has referred the undermentioned set of question to us for our opinion and answer, in exercise of the jurisdiction under section 256(1) of the Income-tax Act, 1961 ('the Act'). The questions relate to two aspects of the 'liability to pay bonus' — its extent and the year in which the deductions as expenses could have been claimed :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in confirming disallowance of bonus of Rs. 15,178/- on altogether new ground which was not made out by the lower authorities?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in permitting the revenue to raise altogether new ground regarding allowance of bonus for the first time in appeal before it and whether it was justified in holding that the liability of the bonus was not referable to the year under reference?"

The broad features in the background are that the assessee which is a private limited company in which the public are not substantially interested, carried on the business of purchase and sale of crushed bones. The question was in respect of the disallowance of the bonus in sum of Rs. 15,178. It was on one hand claimed by the assessee-company before the revenue that the deduction of the bonus payment of Rs. 22,656 should be allowed. The ITO had, on the other hand, found that the total salary paid to the employees to whom the bonus was to be paid worked out to Rs. 37,390/-, and that, the bonus was paid in excess of 20 per cent which was not covered by an agreement between the employer and the employees, and which was not authorised by the conditions of service.

Examining the details the Board of Directors of the company had sanctioned the bonus at 50 per cent of the salary for the accounting year 1973-74

at their meeting held on 5.6.1974. A similar payment was also authorised for the subsequent year at the meeting which was held on 24.6.1975. It was contended on the abovesaid basis before the ITO at the assessment stage that, there was no justification in applying the ceiling prescribed under provisions of section 36(1)(ii) of the Act. Admittedly, according to the proviso inserted in the Act with effect from 25.9.1975, the bonus payable to an employee should not exceed the amount of bonus payable under the relevant statute, namely, the Payment of Bonus Act, 1965. However, it is common ground that the abovesaid proviso inserted later on has no applicability whatsoever to the assessment year under consideration. The frontline stand taken by the revenue all along was that the excess payment was not allowable as the expenditure incurred in the course of the business. The amount of the bonus, according to the taxing authorities, was sanctioned at the meeting of the Board of Directors held on 5.6.1974, while the assessee's previous year had ended on 31.3.1974. It was the say of the revenue that there was no subsisting liability on the part of the assessee to make the payment of bonus in excess of the limits prescribed under the provisions. It was also the view taken by the revenue that the additional liability of bonus was undertaken by the assessee, as a gesture of goodwill towards the members of the staff. According to the taxing authorities, what required consideration was the question in respect of the point of time when the liability could be said to have arisen. According to the revenue, such a liability had not arisen until 5.6.1974, when the directors of the company had held a meeting and had decided to pay bonus at 50 per cent. It was the view of the taxing authorities that, if during the previous year relevant to the assessment year under appeal, there was no obligation either statutory or contractual or otherwise and if the liability was not ascertained at the end of the previous year, the claim for the deduction of excess amount of bonus would not be permissible. This view of the ITO is discernible from the assessing orders at Annexure A, dated 19.10.1976. The decision of the ITO was challenged in appeal before the AAC who had upheld the disallowance as made by the ITO. The AAC has in fact held that the amount of Rs.15,178 being the bonus amount paid in excess of 20 per cent was liable to be disallowed as the said expenditure was not incurred wholly and exclusively for the purpose of business. Being aggrieved and dissatisfied with the aforesaid orders of the AAC dated 20.3.1977 Annexure B, the assessee had approached the Tribunal in appeal. The Tribunal after the consideration of the relevant factual and legal position had come to the conclusion that the authorities below were justified in taking the said view. The Tribunal has observed that the amount of bonus was sanctioned at the meeting of the Board of Directors held on 5.6.1974 while the assessee's s year had ended on 31.3.1974. In the view of the Tribunal, there statutory liability on the part of the assessee to make the payment onus in excess of the limit prescribed under the relevant provision e additional liability of bonus was undertaken by the assessee as

a gesture of goodwill towards the staff, the real question which required consideration was — "What was the point of time when this liability could be said to have arisen"? In the view of the Tribunal, the said liability had not arisen until 5.6.1974 when the directors had held the meeting and had decided to pay the bonus at 50 per cent. The Tribunal after consideration of certain case law on the point has taken the view vide the orders dated 30.11.1978, that the authorities below were justified in their orders and/or assessments. Later on, at the instance of the assessee, the Tribunal has referred the aforementioned two questions to us for our answer and reply.

It is not necessary, according to us, to reproduce what has befallen from the Tribunal while endorsing the view taken by the authorities below. But it appears that, according to the Tribunal, if during the previous year relevant to the assessment year under appeal, there was no obligation, either statutory or contractual or otherwise, and if the liability was not ascertained at the end of the previous year, the claim for deduction of excess amount of bonus paid would not be permissible. The Tribunal has taken into consideration the principle laid down by the Bench decision of this Court in *CWT vs. Sayaji Mills Ltd.* (1974) 94 ITR 54 (Guj.). After considering the principle laid down by this Court in the aforementioned decision, the Tribunal has summed up the position by saying that the liability to pay the bonus did not come into existence till the Board of Directors decided the question about the payment of bonus to the employees and their decision was made after the close of the accounting year. Therefore, in the view of the Tribunal the claim for deduction should not have been allowed as deduction while computing the profits for the year under appeal.

The learned counsel Mr. Mehta, who appears on behalf of the assessee, before us, has urged that the Tribunal and the authorities below were in an error in coming to the conclusion that the bonus paid in excess of the statutory liability because of the contractual obligation was not liable to be deducted in the relevant previous year because it is not necessary for the assessee to show that the bonus amount was actually paid in that particular year. In the submissions of the learned counsel for the assessee a crystallised liability had come in existence during the relevant previous year and that, it is not necessary that the bonus liability should be commensurate with the statutory liability only. According to Mr. Mehta, if the employer, who is a private limited company in the instant case, had agreed to pay the bonus at a rate higher than the statutory rate, then also a crystallised liability had come into existence during the relevant previous year and, therefore, the amount so decided to be paid to the members of the staff was required to be deducted. Anyhow the contention raised by the learned counsel Mr. Shelat appearing on behalf of the revenue is that even if it is accepted that the assessee could have agreed to pay the bonus at a higher rate than the ordinarily prevalent statutory liability, then also, in the instant case,

looking to the facts and circumstances, the deduction could not have been allowed in 'that particular relevant year'. According to Mr. Shelat, if the assessees are allowed to show to the taxing authorities that there was an additional liability of bonus on the basis of the acceptance of the obligation to pay the bonus at a higher rate, it would lead to various unforeseeable complications. Mr. Shelat has moreover urged with vehemence that, at any rate when the liability to pay the bonus at the additional rate was accepted at the Board meeting after the end of the year, the said liability could not have been included as a deductible expenditure in that particular year.

When the orders pronounced by the Tribunal are referred, it becomes clear that the Tribunal has also taken the view that the payment of bonus of the employee is an allowable deduction and even if the payment is made in excess of the minimum amount payable under the Bonus Act, there cannot be any quarrel with the proposition that the amount should not be disqualified for allowance merely on that ground. The main difficulty which was felt by the Tribunal was to the effect that the amount of bonus was sanctioned at the meeting of the Board of Directors held on 5-6-1974 while the assessee's previous year had already ended on 31-3-1974. This factual position as has been reiterated by the Tribunal more than once is not in dispute before us. It is the common ground both for the assessee as well as the revenue, that the assessee's previous year had ended on 31-3-1974, while the amount of the bonus was sanctioned at the meeting of the Board of Directors held on 5-6-1974. The learned counsel appearing on behalf of the assessee has produced for our perusal the text of the minutes of Board meeting held on 5-6-1974 so far as it relates to the question in controversy. The minutes would go to show that the Board meeting was held as accepted by the revenue and the taxing authorities below on 5-6-1974. The bonus which came to be declared by the Board of Directors by the abovesaid resolution at the rate of 50 per cent of the salary was undoubtedly for the year 1973-74. Therefore, this document produced by the learned counsel Mr. Mehta for the assessee would also go to show that the factual aspect as considered by the taxing authorities and the Tribunal are not in dispute.

The learned counsel for the assessee-company has placed reliance upon the Supreme Court decision in *CIT vs. A. Krishnaswami Mudaliar* (1964) 53 ITR 122. This decision on which the learned counsel for the assessee has placed reliance would, according to us, not be of much assistance to the assessee, because it details the prevalent methods or modes of maintaining the accounts. The decision deals with the two current principal systems of book keeping, firstly, the cash system and secondly, the mercantile system. Some reference has been made to a third system prevalent in this country, which is generally known as hybrid or heterogeneous system in which certain elements and incidents of the cash and mercantile systems are combined. It is not in dispute that in the case before us the assessee

had preferred to adopt the mercantile system of accounting. The characteristics of the abovesaid system are rather known and, therefore, a detailed reference to the abovesaid decision, on which reliance has been placed by the learned counsel for the assessee, should not, in our view, detain us any more. The reliance is also placed upon the Supreme Court decision in *Metal Box Co. of India Ltd. vs. Their Workmen* (1969) 73 ITR 53. This decision while considering the provisions of the Payment of Bonus Act, 1965, along with the provisions of the Companies Act, 1956, and the Income-tax Act, 1961, says thus:-

> "Contingent liabilities discounted and valued as necessary, can be taken into account as trading expenses if they are sufficiently certain to be capable of valuation and if profits cannot be properly estimated without taking them into consideration. As estimated liability under a scheme of gratuity, if properly ascertainable and its present value is discounted, is deductible from the gross receipts while preparing the profit and loss account. This is recognised in trade circles and there is nothing in the Bonus Act which prohibits such a practice. Such a provision provides for a known liability of which the amount can be determined with substantial accuracy. It cannot, therefre, be termed a 'reverse'. Therefore, the estimated liability for the year on account of the scheme of gratuity should be allowed to be deducted from the gross profits. The allowance is not restricted to the actual payment of gratuity during the year." (p. 54)

Adopting the abovesaid reasoning the Supreme Court has said that the estimated liability for the year, on account of a scheme of gratuity, should be allowed to be deducted from the gross profits and this allowance is not restricted to the actual payment of the gratuity during the year. There cannot be any quarrel with the abovesaid principle laid down by the Supreme Court while considering the relevant provisions of the said enactment. But the real question in controversy before us, in the present reference, is as to whether when the Board of Directors had adopted a resolution of sanctioning the bonus at a higher rate after the closure of the relevant previous year, the bonus could have been deducted *qua* the said year. Looking to the said question in controversy before us, in our opinion, this decision would not be of any assistance to the assessee in supporting the contention being raised before us.

The Tribunal has accepted that, if during the previous year, relevant to the assessment year under appeal there was no obligation either statutory or contractual or otherwise, and if the liability was not ascertained at the end of the previous year, the claim of deduction of the excess amount of bonus would not be permissible. Even after hearing the learned counsel Mr. Mehta on this point for rather a pretty long time and even after the onsideration of the authorities as referred to above, we are not inclined

to take a different view. The Tribunal has not stated that the bonus amount would not or should not be deducted. The real question was as to which would be the relevant year qua which the abovesaid deduction should be allowed. It is not in dispute that the Board meeting was held only after the end of the year, i.e., on 5-6-1974. If the contention raised by the learned counsel Mr. Mehta for the assessee before us is to be accepted, then it would follow that even if the bonus at a higher rate is being sanctioned by the assessee, may it be a firm, a proprietary concern, or a limited company, after the end of the year and if the bonus so accepted to be paid at a higher rate, is allowed to be as a deductible expenditure from the business income during the relevant year, it would result into unforeseen complications for not only the taxing authorities but for the assessee also. In any case when such eventuality occurs, the old assessment orders shall have to be re-opened or shall have to be revised, leading to variou other complications and situations vis-a-vis other enactments also. Moreover, it should not be overlooked that the bonus which should be deducted must be deducted *qua* the relevant previous year and that, when the Board meeting sanctions the payment of bonus at a higher rate, after the close of that particular year, by no stretch of imagination can it be said that there was an existing liability or a crystallised liability to pay the bonus during the relevant year. Such liability to pay bonus at a higher rate (sic). In view of this, it appears clearly that the view which is being sought to be canvassed by learned counsel Mr. Mehta for the assessee before us cannot be accepted. If, once this decision is reached, it would follow that the Tribunal was justified in law in confirming the disallowance of the bonus amount of Rs. 15,178 and further holding that the liability of the bonus was not referable to the year under reference. The conclusion, therefore, would be, that the questions referred to us require to be answered in the affirmative —against the assessee and in favour of the revenue. We hereby, accordingly, answer and reply the said questions accordingly, with no order as to costs.

(1995) 126 Taxation 410 (Ker.)

IN THE HIGH COURT OF KERALA

(Before Hon'ble Chief Justice Mrs. Sujata V. Manohar & Hon'ble Justice Mr. K. Sreedharan)

Original Petitions Nos. 7662, 7665, 7780 & 7811 of 1994

Commissioner of Income-tax

vs.

Okay Transport Corporation

For the Appellant	:	**N.R. Nair**
For the Respondent	:	**K.N. Sivasankaran and V.V. Asokan**
Decided on	:	19-10-1994

REFERENCE TO HIGH COURT — Tribunal holding assessee following mercantile system of accounting for business of transporation but adopting hybrid system in respect of pronotes issued — Revenue seeking reference — Reference application rejected — Held, order of the Tribunal a finding of fact — No question of law arose out of the order of Tribunal

Income-tax Act, 1961— Section 256.

FACTS & DECISION

The Tribunal has, in its order dated 2.2.1993, considered at length the accounts of the assessee for the relevant A.Ys. 1985-86 to 1988-89. It has come to the conclusion that the assessee's business was transporting goods, and the assessee was following the mercantile system of accounting as far as its business of transportation of goods was concerned, but in respect of the transaction for which the pronotes in question were issued, the transaction was of a special character, distinct and different from other transactions of the assessee. The Tribunal has set out at length the reasons why this transaction has been considered by it as a separate and special type of transaction and has come to the conclusion that the assessee is entitled to employ a hybird system of accounting in respect of this transaction. These are findings of fact and no question of law, therefore, arises, which requires to be referred to the court for determination. Hence,the original petitions are dismissed.

JUDGMENT

(Mrs. Sujata V. Manohar, C.J.)

The Department has filed these petitions under section 256(2) of the Income-tax Act,1961 and has sought a direction that we should ask the Tribunal to refer the following questions of law to us for determination :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding :

(a) 'the Commissioner of Income-tax (Appeals) is not justified in holding that the assessee is liable to be taxed on the accrued interest'.

(b) 'the assessee is entitled to employ the hybrid system of accounting for the above transactions and are not the above findings wrong, unsupported by materials, based on surmises and conjectures' ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in deleting the addition made ?

3. Whether, on the facts and in the circumstances of the case and in the light of the finding of fact by the Commissioner of Income-tax (Appeals) that the assessee was adopting accrual system of accounting and in the absence of contrary finding of fact by the

Tribunal, the Tribunal is right in law and fact in deleting the addition confirmed by the Commissioner of Income-tax (Appeals)?

4. Whether, on the facts and in the circumstances of the case and especially after having found that the assessee is a registered firm engaged in the business of transporting of goods by lorries on hire :-

(i) ' the transaction giving rise to the dispute can be viewed as separate and special type of transaction, distinct and different from the other transactions of the assessee' and are not findings of 'separate and special type' ; 'distinct and different' ; 'from the other transactions of the assessee' against facts, wrong and based on surmises ?".

The Tribunal has, in its order dated February 2, 1993, considered at length the accounts of the assessee for the relevant assessment years 1985-86 to 1988-89. It has come to the conclusion that the assessee's business was transporting goods, and the assessee was following the mercantile system of accounting as far as its business of transportation of goods was concerned, but in respect of the transaction for which the pronotes in question were issued, the transaction was of a special character, distinct and different from other transactions of the assessee. The Tribunal has set out at length the reasons why this transaction has been considered by it as a separate and special type of transaction and has come to the conclusion that the assessee is entitled to employ a hybrid system of accounting in respect of this transaction. These are findings of fact and no question of law therefore, arises, which requires to be referred to us for determination. Hence, the original petitions are dismissed.

(1995) 126 Taxation 412 (Mad.)

IN THE HIGH COURT OF MADRAS

(Before Hon'ble Justice Mr. Somasundaram)

W.P. No.2336 of 1980

Mariam Misria

vs.

Tax Recovery Officer

For the Appellant	:	**U.N.R. Rao & K.R. Tamilmani**
For the Respondent	:	**N.V. Balasubramaniam**
Decided on	:	24-3-1994

RECOVERY OF TAX— Petitioner inheriting certain properties as legal representative — Notice of sale issued — Petitioner challenging the issue of notice and recovery proceedings — Held, recovery proceedings legally continued against legal representative of the defaulter — Notice issued to legal representative valid.

Income-tax Act, 1961 — Sections 159 & 222.

Constitution of India — Article 226.

FACTS & DECISION

U/s 159 of the Act, the legal representative is made liable to pay out of the estate of the deceased any sum payable by the deceased assessee. However, this liability of the legal representative is limited to the extent to which the estate of the deceased is capable of meeting the liability. Section 159(4) only provides that the legal representative becomes personally liable to the extent of the value of any asset of the estate which he disposes of while the liability for tax remains undischarged. Therefore, it is not possible to accept the contention of the learned senior counsel that the Department cannot proceed against the 1/4th share of the petitioners for the recovery of the entire tax arrears due from the deceased assessee. On the death of the defaulter, the recovery proceedings can in law be continued against the legal representatives when a certificate had been duly issued for recovery. There is no merit in this writ petition and it is liable to be dismissed.

Full text of the Judgment is given below :

JUDGMENT

(Somasundaram. J.)

For the reasons stated in the accompanying affidavit, it is prayed that this court be pleased to call for the records of Income-tax Certificate No. PV.9712, dated March 9, 1957, by the respondent and quash by issue of a writ of certiorari or any other appropriate writ or direction all proceedings taken thereon since June 1, 1967, culminating in the I.T.C. P.No.17 notice dated March 21, 1980, issued to the petitioner and thus render justice.

The case of the petitioner as disclosed in the affidavit filed in support of the writ petition is as follows :

The petitioner's father, Hajee K.A. Peer Mohamed, died on June 1, 1967, and his elder brother, K.A. Meera Sahib, died in the year 1975. The petitioner's father K.A. Peer Mohamed, and his brother, K.A. Meera Sahib, migrated to Ceylon in the year 1947. They jointly started a hotel at Kandy on a partnership basis in the name and style of Messers. K.A.M.P.Meera Sahib and Brothers. The petitioner's father had married one Ahose Umma in India before he left for Ceylon. She bore three children, namely, the petitioner, Subaida Umma and Habiba. On January 22, 1967, the pertitioner's father executed a will which was subsequently probated after his demise before the District Court, Kandy. By the said will all the properties of Hajee K.A.Peer Mohamed were bequeathed to his three daughters and to the Arabic School at Kalakad and as per the said will, the petitioner is entitled to 1/4th share in the properties of Hajee Peer Mohamed. On March 22, 1980, the petitioner received in Form No. I.T.C.P. No.17, dated March 21, 1980, a notice from the Tax Recovery Officer stating that in the execution of the Certificate No.B.V.9712, dated March 9, 1957, the Tax

Recovery Officer has ordered the sale of the immovable property mentioned in the list annexed to the notice. The said notice was for settling the sale proclamation. The annexed list contains the items of the properties which not only belonged to the estate of the petitioner's father, the late Hajee Peer Mohamed, but also to his elder brother, Meera Sahib. The petitioner through her counsel, sent a notice on September 9, 1980, by registered post informing the respondent that she is having only 1/4th share in the items of properties mentioned in the annexure to the notice. The impugned notice is invalid because the impugned notice was sent only to the petitioner and no notice was sent to the other legal representatives of the deceased Hajee Peer Mohamed.

The respondents filed a counter-affidavit contending as follows: The Department has no information about the will dated January 22, 1967, executed by Hajee Peer Mohamed. The late Hajee Peer Mohamed and his brother, Meera Sahib, were partners in a firm known as Messrs. Meera Sahib and Brothers. Besides Peer Mohamed's liability to tax in his individual capacity, he was also assessed and became liable to pay tax as partner of the firm. In the said circumstances, a consolidated list of properties was shown in the certificate. The properties mentioned in the income-tax certificate and the subsequent sale proclamation were properly included for the purpose of recovery of the amount of arrears of tax due from the assessee-defaulter. Under rule 85 of Schedule II to the Income-tax Act, 1961, the petitioner as the legal representative of the assessee became the defaulter from the date of the death of the deceased assessee. The attachment of properties was made during the lifetime of the deceased. The arrears of tax relate to the firm, Messrs. K.A. Meera Sahib and Brothers and its partners namely, K.A. Meera Sahib and the petitioner's father, K.A.Peer Mohamed, pertaining to the assessment years 1949-50 to 1952-53. The demand notices were duly sent on the tax defaulters.The proceedings were continued to be taken against the legal representatives of the deceased from the stage at which it had reached on the date of death of the deceased by issuing a notice under I.T.C.P. No.17 on March 22, 1980. There is no necessity to send seperate notices to the legal representaties as it is permissible to continue the proceedings from the stage at which they had reached on the date of the death of the deceased assessee. Inasmuch as Hajee Peer Mohamed and Meera Sahib were partners in the firm Messrs. Meera Sahib Thanaganar and Brother, their liability was joint and several. The properties of the defaulter were brought to sale as early as September 25, 1964. At that time, the assessee was alive. On the death of the tax defaulter, the recovery proceedings can in law be continued against the legal representatives when a certificate had been duly issued for recovery. The properties had already been attached and in continuation of the said proceedings notice of sale proclamation was issued on March 22, 1980. The impugned notice issued for the recovery of the arrears of income-tax of Peer Mohamed are legal and valid.

Mr.U.N.R. Rao, learned senior counsel, reiterating the contentions raised in the affidavit filed in support of the writ petition submitted that under section 159(4) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), every legal representative shall be personally liable for any tax payable by him in his capacity as a legal representative that in the present case apart from the petitioner, there are other legal representatives, and that without issuing notice to the sisters of the petitioner who are the other legal representaties, the respondent cannot proceed against the petitioner by issuing the impugned notice to her alone. Learned counsel further contended that as per the probated will dated January 22, 1967, the petitioner is entitled only to 1/4th share in the properties of the deceased Peer Mohamed. While so, the respondent cannot proceed against the 1/4th share of the petitioner for the recovery of the entire arrears of tax. However, I am unable to accept the above contention of learned senior counsel for the petitioner. Under section 159 of the Act, the legal representative is made liable to pay out of the estate of deceased, any sum payable by the deceased assessee. However, this liability of the legal representative is limited to the extent to which the estate of the deceased is capable of meeting the liability. Section 159(4) only provides that the legal representative becomes personally liable to the extent of the value of any asset of the estate which he disposes of while the liability for tax remains undischarged. Therefore, section 159(4) is not helpful to the petitioner. In the present case, as a matter of fact, all the properties of the deceased Peer Mohamed including the shares got by the petitioner's sisters under the will are proceeded against for the recovery of tax arrears. It must be remembered that the respondent is entitled to proceed against any portion of the assets of the deceased Peer Mohamed in the hands of his legal representatives for the recovery of the tax arrears.Therefore, it is not possible to accept the contention of learned senior counsel that the Department cannot proceed against the 1/4th share of the petitioners for the recovery of the entire tax arrears due from the deceased assessee. Further, it must be pointed out that the properties of the defaulter Peer Mohamed were brought to sale by the Department for the recovery of the tax arrears even during the lifetime of the defaulter as early as September 25, 1964. On the death of the defaulter, the recovery proceedings can in law be continued against the legal representatives when a certificate had been duly issued for recovery. Inasmuch as the properties have already been attached, in continuation of the same proceedings the impugned notice has been issued to the petitioner, who is the legal representative of the deceased assessee. In these circumstances, I am of the view that the notice challenged in this writ petition is perfectly valid and it is not liable to be quashed. There is no merit in this writ petition and it is liable to be dismissed.

Mr. U.N.R. Rao, learned senior counsel further submits that as per the will executed by her father, the petitioner and her two sisters are each

entitled to 1/4th of the properties of their father, that the remaining 1/4th had been bequeathed to a school and mosque; that, on the basis of the will, the petitioner is in possession and enjoyment of her 1/4th share of the properties bequeathed under the will and not the entire properties listed in annexures 1 and 2 and that in view of the above position, the petitioner offers to pay 1/4th of the demand and, therefore, the Department may be directed to relieve the petitioner from her liability on receiving 25 per cent. of the tax arrears. Learned senior counsel further submits that the Department may be also asked to waive the interest portion of the amount demanded. On the facts and circumstances of the case and in view of the position of law referred to above in the proceedings under article 226 of the Constitution of India, it is not possible to issue such directions to the Department. However, it is open to the petitioner to make a representation to the competent authority, setting out all the facts and seek the relief of waiver of interest and also the other relief claimed in this petition. As and when such representation is made by the petitioner to the competent authority, such authority may consider the representation of the petitioner sympathetically taking into consideration the facts and circumstances of the case and pass appropriate orders according to law. With these observations, the writ petition is dismissed. No costs.

(1995) 126 Taxation 416 (Pat.)

IN THE HIGH COURT OF PATNA

(Before Hon'ble Chief Justice Mr.K. Venkataswami & Hon'ble Justice Mr. B.P. Singh)

Tax Cases Nos. 291 to 296 of 1981

Commissioner of Wealth-tax

vs.

Suresh Mohan Thakur

For the Appellant	:	**L.N. Rastogi & S.K. Sharan**
For the Respondent	:	**None**
Decided on	:	15-9-1994

ASSESSEE OWNING GOLD ORNAMENTS — Exemption claimed u/s 5(1)(viii) — Revenue contending in view of retrospective amendment jewellery liable to tax — Assessee taking plea definition of jewellery inserted by *Explanation* effective from 1.4.1972 — Held, Explanation only clarificatory — Ornaments made of gold, silver or other precious metal a part of jewellery even for A.Ys. 1966-67 to 1971-72

Wealth-tax Act, 1957 — Section 5(1)(viii), *Explanation* to Section 5(1)(viii).

FACTS

The assessee, a Hindu undivided family, owned movable and immovable

properties including 144 tolas of gold ornaments. It claimed before the WTO that the value of the gold ornaments was exempt u/s 5(1) (viii) of the Wealth-tax Act and, therefore, should not be included in the net wealth of the assessee under the Wealth-tax Act. It was contended on their behalf that gold ornaments were exempt from wealth tax upto the A.Y. 1971-72, because the Explanation to section 5(1)(viii) by which 'Jewellery' was defined to include ornaments made of gold, silver, platinum or any other precious metal, or any other alloy containing such precious metal, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing, apparel, came into effect from 1.4.1972. Consequently gold ornaments could not be said to be 'Jewellery' in terms of section 5(1)(viii) of the Act, on the valuation date earlier than 1.4.1972. The WTO negatived the claim of the assessee.

DECISION

The crucial question that calls for an answer in these references is whether 'jewellery' includes ornaments made of gold, silver, platinum or any other precious metal, or whether it must mean only those ornaments which have gems or precious stones studded in them. So far as the amendments brought about by the Finance (No.2) Act of 1971 are concerned, it must be noticed that the exclusion of jewellery from the exempting provision came into effect retrospectively, from 1.4.1963. Having regard to the well-settled principles of interpretation, it must be assumed that 'jewellery' was excluded from the purview of exemption granted by section 5(1) (viii) of the Act from 1.4.1963. *Explanation* 1 was inserted prospectively with effect from 1.4.1972. Giving the fiction its full meaning, it must be assumed that during the A.Ys. in question, *Explanation* 1 was non-existent, whereas 'jewellery' was includible in the net wealth of the assessee. In the absence of any statutory definition, 'jewellery' had to be given its natural meaning, and understood in the same way as in ordinary parlance. Obviously, therefore, if without reference to *Explanation* 1, it could be held that 'jewellery' includes not only ornaments studded with gems, precious stones, etc., but also includes ornaments made of gold, silver, platinum, or any other precious metal, the subsequent insertion of Explanation 1 must be understood to be by way of abundant caution. Therefore, the fact that the amendment to section 5 (1) (viii) was effected retrospectively, while *Explanation* 1 was added prospectively, cannot be of much significance in interpreting the word 'jewellery' in section 5(1) (viii) of the Act. The *Explanation* merely made explicit what was implicit in the earlier provision. The answer to both the questions referred to this court must be in the affirmative, in favour of the Revenue and against the assessee.

Cases referred to :

1. *CWT vs. Arundhati Balkrishna* (1968) 70 ITR 203 (Guj.)

2. *CWT vs. Arundhati Balkrishna* (1970) 77 ITR 505 (SC)
3. *CWT vs. Maharaja Vibhuti Narain Singh* (H.H.) (1979) 17 ITR 246

Full text of the Judgment is given below :

JUDGMENT

(B.P. Singh. J.)

In all these matters common questions of law have been referred to this court for its opinion pursuant to a direction of this court under section 27(3) of the Wealth-tax Act, 1957. The assessee in all the cases is the same, and the references relate to different assessment years, namely, assessment years 1966-67 to 1971-72. The questions of law referred to this court for its opinion are the following :

"1. Whether, on the facts and the circumstances of the case, the jewellery included ornaments, according to the first proviso to clause (viii) of sub-section (1) of section 5 of the Act, and the addition of *Explanation* was merely clarificatory ?

2. Whether, on the facts and in the circumstances of the case, the order of the Income-tax Appellate Tribunal is perverse and not based on law ?"

The facts of the case are not in dispute. The assessee, a Hindu undivided family, owned movable and immovable properties including 144 tolas of gold ornaments. It claimed before the Wealth-tax Officer that the value of the gold ornaments was exempt under section 5(1) (viii) of the Wealth-tax Act, and, therefore, should not be included in the net wealth of the assessee under the Wealth-tax Act. It was contended on their behalf that gold ornaments were exempt from wealth-tax up to the assessment year 1971-72, because the *Explanation* to section 5(1)(viii) by which "jewellery" was defined to include ornaments made of gold, silver, platinum or any other precious metal, or any other alloy containing one or more such precious metal, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel, came into effect from April 1, 1972. Consequently, gold ornaments could not be said to be "Jewellery" in terms of section 5(1) (viii) of the Act, on the valuation date earlier than April 1, 1972. The valuation date in each of the relevant years is in the month of September.

The Wealth-tax Officer negatived the claim of the assessee, but on appeal the Appellate Assistant Commissioner following the decision of the Orissa High Court in *CWT vs. Binapani Chakraborty* (1978) 114 ITR 82, allowed the appeal and directed the Wealth-tax Officer to obtain a list of gold ornaments of the assessee to find out whether the gold ornaments had precious or semi-precious stones embedded on them, and include only such gold ornaments at their market price in the net wealth of the assessee,

excluding the gold ornaments having no such precious or semi-precious stones embedded on them,

The appeal preferred by the Revenue before the Tribunal failed. The Revenue asked for a reference to this court under section 27(1) of the Act, but the same was rejected, as the Tribunal was of the opinion that the questions suggestd by the Revenue were either questions of fact, or did not arise out of the order of the Tribunal. Thereafter, the Revenue moved this court under section 27(3) of the Act, and as noticed earlier, this court was pleased to direct the Tribunal to draw up a statement of case in each matter and refer two questions of law for the opinion of this court, which have been reproduced earlier.

Before its amendment by the Finance (No.2) Act, 1971, section 5(1)(viii) of the Wealth-tax Act, 1957, read as under :

> "5. Subject to the provisions of sub-section (1A), wealth-tax shall not be payable by an assessee in respect of the following assets, and such assets shall not be included in the net wealth of the assessee...
>
> (viii) furniture, household utensils, wearing apparel, provisions and other articles intended for the personal or household use of the assessee."

By the Finance (No.2) Act of 1971, after the existing clause (viii),the words "but not including jewellery" were added with retrospective effect from April 1,1963, so that it read as under:

> "(viii) furniture, household utensils,wearing apparel,pprovisions and other articles intended for the personal or household use of the assessee, but not including jewellery".

By the same Finance (No.2) Act, 1971,two provisions and two *Explanations* were also added which were made effective from April 1, 1972, i.e. prospectively. *Explanation* 1 deserves to be noticed. It provides:

> "*Explanation 1* - For the purposes of this clause and clause (xiii), 'jewellery' includes, -
>
> (a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;
>
> (b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel."

It is necessary to notice the background in which section 5 of the Wealth-tax Act was amended by the Finance (No.2) Act,1971. In *CWT vs. Arundhati Balkrishna* (1968) 70 ITR 203 (Guj), the court was considering the question whether the assessee was entitled to claim exemption in respect of jewellery or ornament irrespective of its valuation, if they were intended as articles for personal use of the assessee. The Revenue contended that an assessee

would not be entitled to claim exemption for the jewellery and ornaments irrespective of their value under clause (viii) of section 5(1) on the ground that they are articles intended for personal use of the assessee, in view of the specific provision having been made in respect of jewellery belonging to the assessee under clause (xv) of section 5(1) as then existing, where an initial exemption of Rs.25,000 was provided. The High Court rejected the contention and held that jewellery and ornament, if they were intended for personal use of the assessee,were entitled to claim exemption irrespective of their valuation under clause (viii) of section 5(1) of the Act. The court observed that the term "jewellery" was the collective description of jewellery as well as other ornaments of precious metal. Though the question did not arise in the manner it has arisen in the instant case in *Arundhati Balkrishnu* (1968) 70 ITR 203, the Gujarat High Court did observe that the term"Jewellery" included ornaments of precious metals.

The decision of the Gujarat High Court was apealed against by the Commissioner of Wealth-tax,but the appeal preferred by the Commissioner was rejected and the judgment of the Gujarat High Court affirmed. The judgment of the Supreme Court is reported in *CWT vs. Arundhanti Balkrishna* (1970)77 ITR 505. Dismissing the appeal, the Supreme Court held (at page 511):

> "Under section 5(1)(xv), as it stood at the relevant time, every assessee was entitled to deduct a sum of Rs.25,000 from out of the value of the jewellery in her possession whether the same was intended for her personal use or not but under section 5(1) (viii) the value of all the jewellery intended for the personal use of the assessee stands excluded in the computation of the net wealth of an assessee."

In view of the judgment of the Supreme Court, the Legislature intervened by enacting the Finance (No.2) Act of 1971. Section 5(1)(viii) was amended so as to exclude "jewellery" from the purview of exemption under clause (viii) of section 5(1).

As noticed earlier by the Finance (No.2) Act of 1971 though clause (viii) has been amended with retrospective effect from April 1, 1963, two provisio and two *Explanations*, including *Explanation* 1, were added with prospective effect from April 1, 1972. In view of the amendment brought about to section 5 of the Act, it has been contended on behalf of the assesee that the exclusive definition of "Jewellery" as provided by *Explanation* 1 is applicable only to cases which are governed by the prospective operation of *Explanation* 1. The legislature having enacted *Explanation*1 to the Act prospectively, the same cannot be taken aid of for interpreting the term "jewellery" in clause (viii) of sub-section (1) of section 5 of the Act. It is, therefore, contended that ornaments made of gold, silver or platinum without containing any precious or semi-precious stone are not jewellery within the meaning of that term in clause (viii) of section 5(1) of the Act. On the

other hand, the Revenue contends that *Explanation* 1 has been added by way of abundant caution, and even without *Explanation* 1, giving to the term "jewellery" its ordinary meaning, it must be understood to mean not only ornaments studded with precious stones, but also ornaments made of gold, silver or other precious metal.

In *CWT vs. Jayantilal Amratlal* (1976) 102 ITR 105, a Division Bench of the Gujarat High Court considered a similar question of law referred to it for its opinion. It was urged before the court that as the Legislature had thought fit to define the term "jewellery" by *Explanation* 1, which had been brought into effect from April 1, 1972, the court cannot, for purposes of the assessment years 1963-64 and 1964-65, consider the dictionary meaning of the term "jewellery" as including ornaments also and, therefore, in view of the fact that jewellery as defined by *Explanation* 1 now being excluded from the purview of the exemption under clause (viii) could not be included in the net wealth of the assessee for the purposes of the wealth-tax. The submission was rejected by their Lordships of the Gujarat High Court observing that it did not stand to reason that the Legislature could have such intention of taking out the ornaments from the sweeep of the meaning of the term "jewellery" and thereby continuing the benefit of exemption to the ornaments under clause (viii) of section 5(1). The obvious reasons were that the gold, silver or other ornaments set with the jewels could not have been, without any violence to the language, termed as articles other than jewellery. It drew support from the judgment of the same court in *Arundhati Balkrishna* (1968) 70 ITR 203 (Guj), wherein it was observed that the term "jewellery" was a collective description of jewellery as well as other ornaments of precious metal. It was, therefore, held that the definition given by *Explanation* 1 added by the Finance (No.2) Act, 1971 so far as it related to ornaments, could be only by way of greater caution, because *Explanation* 1 tries to include gold or silver or other metal ornaments set with precious stones as jewellery, which *de hors* the said definition, could not have been, un-doubtedly, articles other than jewellery. It also rejected the submission urged on behalf of the assessee that by giving an inclusive definition to the term "jewellery" by *Explanation* 1 which had prospective operation, the Legislature tried to bring within the sweep of the term "jewellery" those articles which could not have been included otherwise. Their Lordships,however, held that an interpretation clause which extends the meaning of the word does not take away its ordinary meaning. It, therefore, rejected the contention urged on behalf of the assessee that the inclusive definition given by the legislature in *Explanation* 1 took away the primary and obvious meaning of the term "jewellery". It also considered the contention urged on behalf of the assessee that the court was not entitled to take the aid of *Explanation* 1 for the purpose of interpreting clause (viii) of section 5(1), since it must be assumed that *Explanation* 1 did not exist in the statute book in that relevant assessment

year, and at the relevant time, since it took effect from April 1,1972, whereas clause (viii) of section 5(1) stood amended retrospectively with effect from April 1,1963. The court observed that it is well-established that a subsequent Act of Parliament does not afford any useful guide in the construction of the prior Act and the subsequent Act can be resorted to for purposes of construction of the prior Act only when both the Acts deal with the same subject and the part of the prior Act sought to be construed is equivocal and capable of different construction. The court,therefore, concluded that *Explanation* 1 to section 5(1) (viii) of the Act having come into force only with effect from April 1,1972, could not be considered as on the statute book in the relevant assessment years and for all intents and purposes, it would be a reference to a later Act of Parliament. As the natural meaning of the term "jewellery" was clear and precise,there was no justification for considering *Explanation* 1 for construing the term "jewellery" for purposes of the relevant assessment years. The word "include" though generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, it was also susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which,for the purposes of the Act, must invariably be attached to these words or expressions. The court summarised its opinion in the following words (at page 118) :

> "Mr. Shah may be right that in a given context, the word 'include' might import that the enumeration is exhaustive. In the ultimate analysis, however, it is always the question of legislative intent and we are of the opinion that having regard to the obvious fact that gold, silver or platinum ornaments studded with jewels could not have been articles otherwise than of jewellery, Parliament could have only by way of abundant caution thought fit to include the same articles in jewellery by *Explanation* 1, which has been made effective prospectively. The parliamentary exposition of the term "jewellery" so as to include ornaments studded with jewels could not have been, in our opinion, for urposes of enlarging the term of the meaning for the first time, and, therefore, to make it applicable prospectively. The interpretation canvassed on behalf of the assessee would defeat the legislative intent of removing, with retrospective effect from April 1, 1963, the cover of exemption to jewellery by excluding it from articles intended for personal use of an assessee, because, on that interpretation advanced by Mr. Shah, the ornaments made of gold, etc., and studded with precious stones would be considered jewellery only from April 1, 1972. The result would be patently absurd, inasmuch as the articles admittedly of jewellery can be included in the net wealth of an assessee only from April 1, 1972.

We cannot accept any such interpretation which would lead to such absurd result when the intention of Parliament in excluding the jewellery from the purview of exemption under section 5(1)(viii) with effect from April 1, 1963, is manifestly clear in the Finance (No.2) Act, 1971. As stated by us, it is only by way of greater caution that the ornaments of gold, etc., have been also included along with the other articles such as furniture, apparel, etc., studded or sewn with jewels which could not have been obviously termed as jewellery but for the inclusive definition given in *Explanation* 1 and to that extent the said *Explanation* is prospective. In that view of the matter, therefore, the last contention of Mr. Shah that this definition is exhaustive should be rejected. Mr. Shah, therefore, ultimately urged that when two reasonably possible interpretations are open, the court should prefer one which would be favourable to the assessee. In our opinion, the question of preference does not arise as the interpretation canvasses on behalf of the assessee cannot be said to be reasonable or possible interpretation".

In an earlier decision in *CWT vs. Rajeshwar Parshad* [1975] Tax LR 194, a Division Bench of the High Court of Punjab and Haryana took the same view. In that case, it was urged on behalf of the assessee that there was a difference between the ornaments and jewellery. The ornaments were normally of gold and the jewellery was embedded with precious stones. The contention was negatived by the court in the following words (at page 196):

"It appears from the order of the Tribunal that they were of the view that there is a difference between the 'ornaments' and 'jewellery'. Both these expressions are not defined. Therefore, we have to fall back on the dictionary meaning. In Shorter Oxford English Dictionary 'jewellery' means 'jewellers' work; gems or ornaments made or sold by the jewellers; jewels collectively, or as a form of adornment. The word 'jewel' means, according to this dictionary 'an article of value used for adornment usually of the person; a costly ornament especially one made of gold, silver, or precious stones'. In the same dictionary, the meaning of the word 'ornament' is stated to be 'any adjunct or accessory; equipment, furniture, attire, trapping anything used or serving to adorn; a decoration, embellishment.....' It may be mentioned that these words are not terms of art and what has to be seen is what in fact are the articles or, in other words, whether the articles fall within the ambit of the word 'jewellery'. It is not disputed that these ornaments are of gold and are meant for wearing on the person of the assessee. Therefore, they would fall within the ambit of the phrase 'jewellery'.. No playing with words will take them out of the category. In our opinion, the Tribunal fell in this error and that has led to a wrong decision of the matter."

The Allahabad High Court in *CWT vs. His Highness Maharaja Vibhuti*

Narain Singh [1979] 117 ITR 246, agreeing with the view of the Gujarat High Court answered the reference before it in favour of the Revenue. After noticing the judgment of the Supreme Court in *Arundhati Balkrishna* [1970] 77 ITR 505 and the amendments to the Act thereafter it observed (at page 248):

> "The *Explanation* made it quite clear that the term 'jewellery' was taken in its wider meaning. It included ornaments whether studded with precious jewels or not, It was, however, argued that the *Explanation* was prospectively added. It was not available for assessment year prior to 1972. We are unable to agree. The phrase 'but not including jewellery' was added with effect from April 1, 1963. The word 'jewellery' as commonly understood includes ornaments made of precious stones. In our opinion, the *Explanation* only made explicit what was implicit in the provision from its inception. This view finds support from the decision of the Gujarat High Court in *CWT vs. Jayantilal Amratlal* [1976] 102 ITR 105. We are in respectful agreement with the Gujarat High Court".

The Delhi High Court in *CWT vs. Smt. Savitri Devi* [1983] 140 ITR 525 after careful consideration of the decisions on the point held (at page 530):

> "It would appear to us that the word 'jewellery' in common parlance especially in India would certainly include ornaments for personal adornment that are made from gold irrespective of whether they are studded with precious stones or not. When an Indian girl talks of her jewellery, she certainly means to include there in her gold bangles, chain, anklets, etc., even though they are not studded with precious or semi-precious stones. The difference sought to be made out between the two appears to us to be artificial."

It agreed with the view of the Punjab and Haryana, Gujarat and Allahabad High Courts. It did not agree with the contrary view of the Orissa, Calcutta and Madhya Pradesh High Courts. After noticing the contrary view, their Lordships observed (at page 531):

> "We do not agree. We feel that the word 'jewellery' as set out in the dictionaries as above noticed and as understood in common parlance, certainly includes gold ornaments. Gold ornaments made for personal use are almost always a jeweller's job and cannot be made by just anyone. A jewel itself is a costly ornament especially one made of gold, silver or precious stones. Precious stones are not a necessary ingredient to make a piece of jewellery. Exquisite filigree gold and silver jewellery is made in Orissa and other parts of the country and can certainly not be made by any one other than an expert jeweller. The Hindi word of jewellery 'gehena' would certainly include such jewellery within its ambit. It is unthinkable that a gold 'champakali' or 'hanali' or a wedding ring is not jewellery just because it is not studded with stones. It would

appear to us that there is nothing redundant or absurd in the *Explanation* being prospective. The terms of the *Explanation* cannot take away the ordinary meaning of the word 'jewellery'. In any case, the *Explanation* does not deal with gold ornaments only but also elucidates, *inter alia*, that even if gold ornaments, etc., are sewn into any wearing apparel they would be jewellery; this is certainly an extended meaning of the word and not one as used in common parlance; similar is the position with regard to precious or semi-precious stones whether set in any furniture, utensil or other article or worked or sewn into any apparel or not. The artificially enlarged meaning as extended by the prospective definition provided for in *Explanation* 1 above mentioned also included by way of abundant caution the natural meaning of the term. It has apparently been included so that the common parlance meaning should not escape attention."

The Delhi High Court has reiterated its above view in two subsequent judgments in *CWT vs. Rukmani Devi* [1983] 142 ITR 41 (Delhi) and *CWT vs. Ananti Devi* [1987] 163 ITR 182 (Delhi).

There are two decisions of the Orissa and Calcutta High Court's to the contrary, reported in the same volume of the "Income-tax Reports". The decision of the Orissa High Court is *CWT vs. Binapani Chakraborty* [1978] 114 ITR 82 and that of the Calcutta High Court in *CWT vs. Aditya Vikram Birla* [1978] 114 ITR 711.

In *Binapani Chakraborty's* case [1978] 114 ITR 82, the Orissa High Court noticed the decision of the Supreme Court in *Arundhati Balkrishna's* case [1970] 77 ITR 505. It noticed the amendment of the Act which came after the aforesaid judgment of the Supreme Court. The discussion is contained in one paragraph of the judgment which is as follows (at page 84):

"In view of the decision of the Supreme Court and in view of the clear provision that *Explanation* 1 has no retrospective effect, in our opinion, the Tribunal took the right view when it came to the conclusion that jewellery incorporated in clause (viii) shall have the meaning as given by the Supreme Court to the term and the legislative meaning given to the term by *Explanation* 1 shall operate from April 1, 1972, In that view of the matter, the deletion directed by the Tribunal of the value of the gold ornaments from the taxable net wealth was justified."

I find it difficult to agree with the view of the Orissa High Court. The Supreme Court in *Arundhati Balkrishna's* case [1970] 77 ITR 505 did not consider the question whether "jewellery" included gold ornaments or whether that term included only ornaments embedded with jewels and precious stones. The question before the Supreme Court was entirely different and the judgment of the Supreme Court renders no assistance in giving meaning to the word "jewellery", in the context it has arisen in

the instant cases. The decision of the Orissa High Court noticed *Explanation* 1, which was added with effect from April 1, 1972. The judgment proceeds on the basis that but for *Explanation* 1, the term "jewellery" would not have included ornaments made of gold, silver or any other precious metal which did not contain precious or semi-precious stones. It does not appear from the judgment that the question as to what "jewellery" means in ordinary parlance, was agitated before the court.

The Calcutta High Court in *Aditya Vikram Birla's* case [1978] 114 ITR 711 held that the dictionary meaning of "jewellery" was not so wide or clear as to bring in all valuable ornaments within its fold. On the contrary, in popular parlance "jewellery" connotes use of stones, precious, semi-precious or even imitation, in the ornament concerned. Proceeding on this basis, and not finding it safe to go only by the original and modern English meaning,their Lordships observed that what is to be kept in view is the widespread use of ornaments and jewellery in this country and the specific connotation of the various types of jewellery in use in the country and described in the various local languages. Proceeding on such basis their Lordships considered the amendment introduced by the Finance (No.2) Act, 1971, and came to the conclusion that by such amendment the meaning of the word "jewellery" was extended to include ornaments made of gold, silver, platinum or any other precious metals whether or not containing any precious or semi-precious stone. If the contention for the Revenue that in its ordinary meaning the term "jewellery" always included all ornaments made out of precious metals with or without stones, was accepted, the introduction of the above *Explanation* I to setion 5(1)(viii) with prospective effect would be redundant and also absurd. Their Lordships agreed with the view of the Orissa High Court in *Smt. Binapani Chakraborty's* case [1978] 114 ITR 82 and did not approve of the view of the Gujarat High Court in *Jayantilal Amrat Lal's* case [1976] 102 ITR 105.

A Full Bench of the Madhya Pradesh High Court in *CWT vs. Smt. Tarabai Kanakmal* [1983] 140 ITR 374 agreed with the view of the Orissa and Calcutta High Courts and did not approve of the view held by the Gujarat, Allahabad and Punjab and Haryana High Courts. Their Lordships after considering the dictionary meaning given to "jewellery" and "jewel" observed that although the dictionaries are not dictators of statutory construction, yet if there is nothing better to rely upon, the dictionaries may be used to find out the general sense in which any particular word is understood in common parlance. The ordinary meaning of the word "jewellery" was not so wide as to cover all ornaments. The ordinary meaning of the word as is known now will embrace precious or semi-precious stones and gold and silver ornaments which contain precious or semi-precious stones. It was in this sense that the word "jewellery" as used in clause (viii) has to be understood before April 1, 1972. The submission that the inclusive definition contained in the *Explanation*, which became effective from April

1, 1972,was added merely as a matter of abundant caution, was rejected, as in their opinion it was clearly intended to give a wider meaning to the word "jewellery" with effect from April 1, 1972. The very fact that the words "but not including jewellery" were retrospectively added with effect from April 1,1963, and the *Explanation* was added with effect from April 1, 1972, by the same Finance Act in section 5(1)(viii),gave out a clear intention of Parliament that the wider meaning of the word "jewellery" as contained in the *Explanation*, was not to be applied for any assessment year prior to April 1, 1972. Their Lordships noticed that the dictionary meaning of the words "jewel" and "jewellery" would go to show that although these words in generic sense are used to denote costly ornaments made of gold and silver, whether they were studded with precious stones or not, yet this wide meaning has become obsolete and these words are now restricted to precious stones and ornaments containing precious stones.

The Rajasthan High Court in *Hanuman Mal Sekhani vs. CWT* [1987] 168 ITR 364 preferred the view taken by the Orissa, Calcutta, Punjab and Haryana and Madhya Pradesh High Courts, to the view taken by the Gujarat, Allahabad and Delhi High Courts. After noticing the divergent views on the subject their Lordships concluded thus (at page 374):

> "Thus, a consideration of the provisions of section 5(1)(viii) and the amendment introduced therein by the Finance (No.2) Act, 1971, with retrospective effect from April 1, 1963, and the insertion of *Explanation* 1 in that sub-section prospectively with effect from April 1, 1972, go to show that Parliament intended that ornaments made of gold, silver or other precious metals would be included in the term 'jewellery' only after *Explanation* 1 was added to section 5(1) (viii) with effect from April 1,1972, and earlier thereto gold, and silver ornaments could be included in jewellery only in case they were studded with precious or semi-precious stones or sewn into any wearing apparel."

The Gauhati High Court in *CWT v. Smit. Ratni Devi Beria* [1989] 179 ITR 202 ; [1989] Tax LR 47 has taken the same view and from the report it appears that the judgment of the Orissa High Court in *Smt. Binapani Chakraborty's* case [1978] 114 ITR 82 was brought to its notice. However, though reference was made to the judgment of the Gujarat High Court, since that report was not shown to their Lordships, they did not feel it safe to take into consideration the ratio of that decision as mentioned in the A.I.R. Manual. Their Lordships considered the legislative changes brought about to section 5 of the Wealth-tax Act and came to the conclusion that the intention of the Legislature was not to include gold ornaments within the definition of jewellery, prior to April 1, 1972. The question whether "jewellery" as understood in common parlance included gold ornaments, was neither agitated before the court nor decided by it.

There is only one other decision of the Punjab and Haryana High Court

which requires to be noticed. I have noticed the judgment of the same High Court in *CWT vs. Rajeshwar Parshad* [1975] Tax LR 194 wherein the court took the view that ornaments made of gold, meant for wearing on the person of the assessee fall within the ambit of the phrase "jewellery". However, in *Smt. Meera Jaiswal vs. CWT* [1982] 136 ITR 548 (P & H), a coordinate Bench of the same court took a different view. Agreeing with the view of the Calcutta and Orissa High Courts, and disagreeing with the view of the Allahabad and Gujarat High Courts, their Lordships held that in popular parlance "jewellery" connotes use of stones, precious, semi-precious or even imitation in the ornaments concerned. It was for this reason that the *Explanation* was introduced and the meaning of the word "jewellery" was extended to include ornaments made of gold, etc, If in its ordinary meaning the term "jewellery" always included all ornaments made out of precious metals with or without stones, then the introduction of the Explanation to section 5(1)(viii) with prospective effect would be redundant and also absurd. It is surprising that the earlier decision of a Division Bench of the same court in *CWT vs. Rajeshwar Parshad* [1975] Tax LR 194, was not brought to its notice, for I am sure if the same was brought to its notice, the learned judges would have either followed the same as a binding precedent, or referred the matter for decision by a larger Bench. The decision appears to have been rendered per incuriam.

The crucial question, to my mind, that calls for an answer in these references is whether "jewellery" includes ornaments made of gold, silver, platinum or any other precious metal, or whether it must mean only those ornaments which have gems or precious stones studded in them. It cannot be disputed that the words "wearing apparel ... and other articles intended for the personal .. . use of the assessee" in section 5(1)(viii) of the Act includes jewellery. In *Arundhati Balkrishna* [1970] 77 ITR 505, the Supreme Court held that under the aforesaid provision, the value of all the jewellery intended for the personal use of the assessee stands excluded in the computation of the net wealth of the assessee. The deduction of Rs.25,000 from out of the value of the jewellery under section 5(1)(xv) as it then stood, was permissible, regardless of the fact whether the same was intended for personal use or not. Such being the ratio, the decision is of no assistance in answering the question that arises for consideration in the instant case.

So far as the amendments brought about by the Finance (No.2) Act of 1971 are concerned, it must be noticed that the exclusion of jewellery from the exemption provision came into effect retrospectively, from April, 1963. Having regard to the well-settled principles of interpretation, it must be assumed that "jewellery" was excluded from the purview of exemption granted by section 5(1)(viii) of the Act from April 1, 1963. *Explanation* 1 was inserted prospectively with effect from April1, 1972. Giving to the fiction its full meaning, it must be assumed that during the assessment years in question, *Explanation* 1 was non-existent, whereas "jewellery" was

includible in the net wealth of the assessee. In the absence of any statutory definition, "jewellery" had to be given its natural meaning, and understood in the same was as in ordinary parlance. Obviously, therefore, if without reference to *Explanation* 1, it could be held that "jewellery" includes not only ornaments studded with gems, precious stones, etc, but also includes ornaments made og gold, silver, platinum,or any other precious metal, the subsequent insertion of *Explanation* 1 must be understood to be by way of abundant caution. If, on the other hand, it is held that "jewellery" cannot be understood to include ornaments made of gold,silver, platinum and other precious metals, without gems or precious stones studded or embedded in them, *Explanation* 1 must be understood as an inclusive definition giving an extended meaning to "jewellery" so as to include that, which but for the inclusive definition could not be considered to be "jewellery". In my view, therefore, the fact that the amendment to section 5(1)(viii) was effected retrospectively, while *Explanation* 1 was added prospectively, cannot be of much significance in interpreting the word "jewellery" in section 5(1)(viii) of the Act,as it stood in the years of assessment in question. It cannot be lost sight of that an *Explanation* only functions to explain the meaning and effect of the main provision to which it is an *Explanation*, and to clear up any doubt or ambiguity in it.

The dictionary meaning of "jewellery" appears to be wide enough to include articles of gold and other precious metals used for personal adornment. Jewellers' work ; gems or ornaments made or sold by the jewellers; jewels collectively, or as a form of adornment, come within the dictionary meaning of "jewellery". This has been exhaustively dealt with in various judgments to which reference has been made earlier. The Madhya Pradesh High Court observed that a perusal of the dictionary meaning of the words "jewel" and "jewellery" will go to show that although these words in a generic sense were used to denote costly ornaments made of gold or silver, whether they were studded with precious stones or not, yet this wide meaning has become obsolete and these words are now restricted to precious stones and ornaments containing precious stones. The Calcutta High Court observed that the dictionary meaning of the word "jewellery" was not so wide or clear as to bring in all valuable ornaments within its fold. On the contrary, it appeared to their Lordships that in popular parlance "jewellery" connotes use of stones, precious, semi-precious or even imitation, in the ornament concerned. It was not safe to go only by the original and modern English meaning having regard to the widespread use of ornaments and jewellery in our country and the specific connotation of the various types jewellery in use in the country and described in various local languages. In Hindustani and Bengali at least a clear distinction is made between ornaments which are made of gold or silver and ornaments which are studded with stones. On the other hand,the Gujarat High Court as well as Delhi High Court took the view that the dictionary meaning of the word "jewellery" as well

as what is understood by that word in ordinary parlance is the same. The Gujarat High Court held that so far as the dictionary definition is concerned, even according to the dictionary meaning, jewellery and ornaments can be collectively described as "jewellery". The natural impact of the terms "jewellery" was well-known as a collective description of "jewel" as well as other ornaments of precious metals. Similarly, the Delhi High Court had no difficulty in holding that the word "jewellery" in common parlance specially in India, would certainly include ornaments for personal adornment that are made from gold irrespective of whether they are studded with precious stones or not. When an Indian girl talks of her jewellery, she certainly means to include therein her gold bangles, chain, anklets, etc. even if they are not studded with precious or semi-precious stones.

I am inclined to agree with the view expressd by the Gujarat and Delhi High Courts, because I have no hesitation in holding that "jewellery" connotes articles made of precious metals and are meant for personal adornment. The fact that jewels or precious stones are embedded in such articles will not make any difference. The distinction sought to be made between ornament and jewellery to my mind is artificial. It may be that in different parts of the country ornaments made only of gold or other precious metal may be described in a particular way and different from ornaments which are studded with any precious or semi-precious stones. That, however, will not make any difference to the meaning of the word "jewellery", because that must include ornaments meant for personal adornment made of gold, silver or any other precious metal whether or not studded with precious or semi-precious stones. Equally, there appears no reason to impute an intention to the Legislature that by excluding the jewellery from the exemption clause, it purported to exclude only ornaments studded with precious or semi-precious stones and not ornaments made of gold, silver or other precious metal. The word "jewellery" has been used in a generic sense as to include both the above categories. In the context of the Wealth-tax Act, it stands to reason that the Legislature did not intend to include within the purview of exemption valuable articles such as "jewellery" while granting exemption for the value of furniture,household utensils, wearing apparel intended for personal or household use of the assessee.

If it is held that jewellery includes ornaments made of gold, silver, platinum, whether or not studded with precious stones, it would not be permissible to give to the word a narrow meaning as to exclude ornaments made only of precious metals, merely because an *Explanation* added subsequently clarified that jewellery would include ornaments made of gold, silver or any other precious metal or alloy whether or not containing any precious or semi-precious stone. The *Explanation* merely made explicit what was implicit in the earlier provision.—

In this view of the matter, the answer to both the questions referred to

this court must be in the affirmative, in favour of the revenue and against the assessee. They are answered accordingly.

K. Venkataswami C.J. — I agree.

(1995) 126 Taxation 431 (P&H)

IN THE HIGH COURT OF PUNJAB & HARYANA

(Before Hon'ble Mr. Justice A.S. Nehra)

Criminal Misc. No. 12552-M of 1993

Rajinder Pal Mahajan

vs.

Ralson India Ltd. & Others

For the Appellant	:	**R.S. Ghai & A.P.S. Deol**
For the Respondent	:	**H.S. Hooda & Sanjeev Sheoran**
Decided on	:	22-4-1994

PROSECUTION— Search of premises of an employee of the company — Cash seized during the course of search operations— Fixed deposit receipts, blank cheques and transfer advices seized from his possession — Management finding that employee withdrawing certain amounts from the account of the company and not accounted for in the books— Employee committing criminal breach of trust— Application made by company to release currency and other investment on superdari— Assessee's application dismissed by Chief Judicial Magistrate— Company appealing before Additional Sessions Judge and department also filing application for direction to trial court to release the money and other valuables to the Income-tax Department —Additional Sessions Judge remiting release to the company by furnishing bank guarantee — Held, release of the amount justified.

Income-tax Act,1961

Indian Penal Code, 1860 — Sections 120B, 406, 408, 409, 467 & 471

Criminal Procedure Code, 1973 — Section 482.

FACTS

A case was registered u/ss 406, 408, 409, 467, 471 and 120B of Indian Penal Code, against Rajinder Pal Mahajan accused. As per the allegations contained in the FIR, the accused was appointed as Financial Controller-Cum-Company Secretary of Ralson India Ltd., Ludhiana, and joined the company in that capacity on 29.11.1985. During the course of his employment he used to get the signatures of Managing Director on blank cheques and transfer advices. The abuse of position by the accused came to light when, as a result of the raid on his premises by the Income Tax Department, FDRs amounting to Rs.55,33,129/-, blank

cheques and transfer advices were seized from the possession of the accused. On examining the accounts of the company, the management found that the accused had withdrawn an amount of Rs.1.29 lakhs from the accounts of the company from the Punjab National Bank, and the said amount had not been accounted for in the books of account of the company. He had cheated the company by signing in fictitious names and withdrawing huge amounts in collusion with the bank officials. During the course of investigation by the police, an amount of Rs. 40,58,412 alongwith Indira Vikas Patras valued at Rs. 9,10,000 was recovered from the possession of the accused. An application was made for the release of the currency and Indira Vikas Patras on superdari. Respondent No.1 filed a revision petition before the Addl. Sessions Judge against the order dated 2.3.1993 passed by the trial court,. When the revision petition was pending, the Income-tax Department also filed an application before the Additional Sessions Judge pleading that the trial court be directed to release the money alongwith the Indira Vikas Patras to the Income-tax Department.

DECISION

The Additional Sessions Judge observed that admittedly the accused from whose possession such a huge amount was recovered, was a paid employee of the company, that there is no explanation whatsoever from his side to account for possession of such a huge amount in hard currency, which can be safely said to be disproportionate to his ostensible means; that the allegations are that he committed a breach of trust and thus misappropriated funds belonging to the company to the tune of Rs.1.29 lakhs by abusing his position as Financial Controller-cum-Company Secretary, the accused had easy access to the funds and had means to misappropriate the same by committing breach of trust of the company. The learned Additional Sessions Judge, therefore, held that, in the circumstances of the case, the company appears to be entitled to the custody of the amount. The Additional Sessions Judge ordered the amount of Rs.40,58,412/- to be released on the company's furnishing a bank guarantee in the sum of Rs.50 lakhs to the satisfaction of the learned Ilaqa Magistrate. The learned counsel for the petitioner contended that the order passed by the Additional Sessions Judge is illegal and without jurisdiction. The Hon'ble Court held that since the amount of Rs.40,58,412/- has been released to the company on its furnishing a bank guarantee in the sum of Rs.50/- lakhs, therefore, the order passed by the Additional Sessions Judge is legal and within his jurisdiction. In view of the above discussion, the Hon'ble Court held that there is no merit in this petition and the same is dismissed.

Full text of the Judgment is given below :

JUDGMENT

(A.S. Nehra, J.)

Rajinder Pal Mahajan has filed this petition under section 482 of the Code

of Criminal Procedure, 1973, for quashing the impugned order dated September 24, 1993, passed by the Additional Sessions Judge, Ludhiana. Briefly stated, the facts of the case are :

A case was registered, vide FIR No.230 dated December 7,1992,at Police Station.Focal Point, Ludhiana, under sections 406, 408, 409, 467, 471 and 120B, Indian Penal Code, against Rajinder Pal Mahajan accused. As per the allegations contained in the FIR,the accused was appointed as Financial Controller-cum-Company Secretary of Ralson India Limited, Ludhiana, and joined the company in that capacity on November 29, 1985.

During the course of his employment, he used to get the signatures of Shri Sanjeev Pahwa, Managing Director, on blank cheques and transfer advices. The abuse of position by the accused came to light when, as a result of the raid on his premises by the Income-tax Department, FDRs amounting to Rs.55,33,129, blank cheques and transfer advices were seized from the possession of the accused. On examining the accounts of the company, the management found that the accused had withdrawn an amount of Rs.1.29 lakhs from the accounts of the company from Punjab National Bank, Branch Dhandari Kalan, and the said amount had not been accounted for in the books of account of the company and thereby the accused had committed criminal breach of trust in respect of the said amount and had misappropriated the same to his own use by getting FDRs and the property in the names of his relations. He had cheated the company by signing in fictitious names and withdrawing huge amounts in collusion with the bank officials. During the course of investigation by the police, an amount of Rs.40,58,412 alongwith Indira Vikas Patras valued at Rs.9,10,000 was recovered from the possession of the accused.

An application was made for the release of the currency and Indira Vikas Patras on superdari. The application was dismissed by Shri Naginderjit Singh, Judicial Magistrate, 1st Class, Ludhiana, vide his order dated March 2,1993, on the ground that both the parties were laying claim to the amount of Rs.40,58,412. This order does not say anything about the Indira Vikas Patras. Thereafter, another application was moved before the learned Chief Judicial Magistrate,Ludhiana,which was dismissed, vide order dated June 7, 1993, on the ground that an application having already been dismissed by the court of Shri Naginderjit Singh, vide order dated March 2, 1993, no fresh application was maintainable.

Respondent No.1 filed a revision petition against the order dated March 2,1993 passed by the trial court before the Additional Sessions Judge, Ludhiana. When the revision petition was pending, the Income-tax Department also filed an application before the Additional Sessions Judge pleading that the trial court be directed to release the money along with the Indira Vikas Patras to the Income-tax Department.

The revision petition filed by respondent No.1 was opposed on the ground

that the same is time barred. When this objection was raised, respondent No.1 filed an application for condoning the delay. After hearing the parties, the Additional Sessions Judge, in the interest of justice, condoned the delay in filing the revision petition and held that there are sufficient grounds for condoning the delay in filing the revision petition. The application filed by the Income-tax Department was held to be not maintainable. The Additional Sessions Judge observed that admittedly the accused (petitioner) from whose possession such a huge amount was recovered, was a paid employee of the company; that there is no explanation whatsoever from his side to account for possession of such a huge amount in hard currency, which can be safely said to be disproportionate to his ostensible means; that the allegations are that he committed a breach of trust and thus misappropriated funds belonging to the company to the tune of Rs.1.29 lakhs (Rs.1,29,000) by abusing his position as Financial Controller-cum Company Secretary and that apparently, in his capacity as Financial Controller-cum-Company Secretary, the accused (petitioner) had easy access to the funds and had means to misappropriate the same by committing breach of trust of the company. The learned Additional Sessions Judge, therefore, held that, in the circumstances of the case, the company appears to be entitled to the custody of the amount lying in the custody of the court and that it would not be just and proper to keep such a huge amount locked in sealed boxes, thereby keeping it out of circulation resulting in national loss. Accordingly, the Additional Sessions Judge ordered the amount of Rs. 40,58,412 to be released on the company's furnishing a bank guarantee in the sum of Rs.50 lakhs (Rs.50,00,000) to the satisfaction of the learned Illaqa Magistrate, undertaking to comply with and duly perform the final orders of the trail court regarding the payment of the amount at the conclusion of the trial court regarding the payment of the amount at the conclusion of the trial. The Additional Sessions Judge further held that in case the accused (petitioner) is found to be entitled to the payment of the amount, the company shall be liable to pay the amount alongwith interest at the rate of 12 per cent per annum for the period of retention of the amount.

Learned counsel for the petitioner has contended that the order dated September 24, 1993, passed by the Additional Sessions Judge, Ludhiana is illegal and without jurisdiction. It has been further contended by learned counsel for the petitioner that the learned Additional Sessions Judge has also erred in condoning the delay in filing the revision petition.

Learned counsel for respondent No.1 has contended that the order dated September 24, 1993, passed by the Additional Sessions Judge is legal and within jurisdicition. He further submitted that the delay in filing the revision petition was condoned when respondent No.1 was able to prove that there were sufficient grounds for condoning the delay in filing the revision petition. It has been further contended by learned counsel for respondent No.1 that

the amount of Rs.40,58,412 has been released to the company on its furnishing a bank guarantee in the sum of Rs.50 lakhs and that, therefore, the order passed by the learned Additional Sessions Judge is just and proper and that it has been passed in the interest of justice.

After hearing learned counsel for the parties, I find force in the contention raised on behalf of respondent No.1 The learned Additional Sessions Judge has exercised his jurisdiction properly in condoning the delay in filing the revision petition, because respondent was able to prove that there were sufficient grounds for condoning the delay in filing the revision petition. Since the amount of Rs.40,58,412 has been released to the company on its furnishing a bank guarantee in the sum of Rs.50 lakhs, therefore, the order passed by the Additional Sessions Judge is legal and within his jurisdiction. The petitioner did not file any application before the trial court for *superdari* of this amount. He also did not file a revision petition when the application of the company was declined on March 2, 1993. Therefore, the conduct of the petitioner shows that he was simply interested in opposing the application of the company for *superdari* of the amount of Rs.40,58,412. The interest of the petitioner has been properly safeguarded by the learned Additional Sessions Judge. The learned Additional Sessions Judge has held that in case the accused (petitioner)is found to be entitled to the payment of the amount, the company shall be liable to pay the amount along with interest at the rate of 12 per cent per annum for the period of retention of the amount. Therefore, no injustice has been done to the petitioner.

In view of the above discussion, I hold that there is no merit in this petition and the same is dismissed.

(1995) 126 Taxation 435 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

(Before Hon'ble Mr. Chief Justice K.C. Agarwal & Hon'ble Mr. Justice V.K. Singhal)

D.B. Wealth-tax Reference No. 127 of 1986

Pukhraj Rikhahdas

vs.

Commissioner of Wealth-tax

For the Appellant	:	**Vineet Kothari**
For the Respondent	:	**D.S. Shishodia**
Decided on	:	13-10-1992

REFERENCE — Assessee contesting valuation of property — Valuation of property already determined by a certain valuer for past years — No change in circumstances — Tribunal refusing to reconsider same facts again — Assessee filing reference application — Reference application rejected — Held, Tribunal justified in rejecting application for reference.

Wealth-tax Act, 1957 — Sections 7 & 27(3).

FACTS

The brief facts of the case are that there was a property which was given on rent. The said firm consisted of the assessee and his brother as partners. The rent which was received from the property was not considered as adequate and was considered collusive. A suit was also pending in the Court and, therefore, the valuer estimated the valuation of the property at Rs.1,95,000. Half share of it was taken at Rs. 98,000. The assessee submitted the return showing the valuation of the property at Rs.75,000/- which was subsequently reduced by assessee to Rs.36,140. The ITO held that there was no change in the facts and circumstances of the case and, therefore, he adopted the valuation of the property at Rs.98,000 as assessed earlier. The appeal before the AAC was also rejected and the Tribunal has held that the matter has already been considered by the Tribunal in which the same valuation was taken and as such there is no reason to take a different view. The appeal was dismissed.

DECISION

The Hon'ble Court held that the valuation was adopted by the Tribunal having become final and there being no change in the circumstances, the assessee cannot be allowed now to reagitate the same issue on the same facts and circumstances. There should be finality even under the Income-tax law in respect of a finding which has been given in a particular year. The finding, which has been given with regard to valuation of the property, is undisturbed and as such the Hon'ble Court was of the opinion that the Tribunal was justified in rejecting the application for reference.

Cases referred to :

1. *Sardar Kehar Singh vs. CIT* (1992) 195 ITR 769 (Raj)
2. *Radhasoami Satsang vs. CIT* (1992) 193 ITR 321 (SC)

Full text of the Judgment is given below :

JUDGMENT

(V.K. Singhal, J.)

The assessee has submitted an application under section 27(3) of the Wealth-tax Act, 1957, ('the Act') raising the following question arising out of the order of the Tribunal in respect of the assessment year 1978-79 :

> "Whether, on the facts and circumstances of the case, the Tribunal was justified in valuing the Bombay property on the basis of the valuation made by the final valuer adopting hypothetical rent capitalisation method and rejecting the claim of the assessee for valuing the property on the basis of capitalisation of actual receipts of rent?"

The brief facts of the case are that there was a property which was given on rent to N.P. Metal Works. The said firm consisted of the assessee and his brother as partners. The rent which was received from the property was not considered as adequate and was considered collusive. A suit was also pending in the Court and, therefore, the valuer estimated the valuation of the property at Rs.1,95,000. Half share of it was taken at Rs.98,000. The assessee submitted the return showing the valuation of the property at Rs. 75,000/- which was subsequently reduced to Rs.36,140. The ITO held that there was no change in the facts and circumstances of the case and, therefore, he adopted the valuation of the property at Rs.98,000 as assessed earlier. The appeal before the AAC was also rejected and the Tribunal has held that the matter has already been considered by the Tribunal in which the same valuation was taken and as such there is no reason to take a different view. The appeal was dismissed.

The submission of the learned counsel for the assessee is that a property which is let on rent should be assessed on rent capitalisation basis. A number of authorities have been cited in this respect which we do not propose to take into consideration as this proposition is not in dispute that, once a property is let on rent, then normal rent capitalisation method should be adopted. In the present case, these factors were taken into consideration and the Tribunal has already taken into consideration the fact of its being let on rent. Since the firm to which the property was rented out consisted of the assessee and his brother, the figure as shown in the return was not considered as adequate and, therefore, the valuation was taken independently. The said valuation continued for a number of years. The Tribunal was justified in taking the view that there being no change in the circumstances, the valuation cannot be changed.

The Court has held in *Sardar Kehar Singh vs. CIT* (1992) 195 ITR 769 that, normally, *res judicata* does not apply to taxation proceedings. However, this general rule is subject to the qualification that a finding reached in assessment proceedings for an earlier year after due inquiry would not be reopened in a subsequent year, if no fresh facts are found in the subsequent assessment year. This is on the principle that there should be finality and certainty in all litigations including those arising out of the income-tax law. Recently, the Supreme Court in *Radhasoami Satsang vs. CIT* (1992) 193 ITR 321, 329, has held that 'strictly speaking, *res judicata* does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not at all be appropriate to allow the position to be changed in a subsequent year'.

The above proposition of law is very clear and fully applies to the facts

of this case. The valuation which was adopted by the Tribunal having become final and there being no change in the circumstances, the assessee cannot be allowed now to reagitate the same issue on the same facts and circumstances. There should be finality even under the income-tax law in respect of a finding which has been given in a particular year. The finding, which has been given with regard to valuation of the property, is undisturbed and as such we are of the opinion that the Tribunal was justified in rejecting the application for reference.

The reference application under section 27(3) is, accordingly, dismissed.

No order as to costs.

(1995) 126 Taxation 438 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit K. Sengupta & Hon'ble Mr. Justice Shyamal Kumar Sen)

IT Reference No. 422 of 1991

Commissioner of Wealth-tax

vs.

Champa Properties Ltd.

For the Appellant	:	**L.K. Chatterjee**
For the Respondent	:	**None**
Decided on	:	20-7-199[illegible]

VALUATION OF ASSETS — Assessee giving properties on long lease — Three lessees giving permission to the assessee to sublet on payment of Rs.2,000 per month to each of them — Agreement arrived at between the assessee and the lessees — Property let out at a much higher rate and lessees giving vacant possession — While valuing property under rule 1BB assessee claiming deduction of Rs.72,000 out of maintainable rent — Claim of the assessee disallowed by Assessing Officer — Held, direction of the Tribunal to exclude the said amount while determining the net maintainable rent correct.

Wealth-tax Act, 1957 — Section 7 read with rule 1BB.

COMPUTATION OF NET WEALTH — Assessee showing municipal taxes payable as liabilities — Liabilities allowed — Revenue holding that these liabilities utilised by way of loans advanced and deposits in banks and for acquiring shares — Holding these deposits and investments as debts secured on house property and therefore liable to be included in total wealth under clause (viii) of Section 40(3) of Finance Act 1983 — Tribunal holding these assets not covered and as such addition made unjustified — Held, the view

taken by the Tribunal correct — Said amounts could not be assessed to wealth-tax.

Wealth-tax Act, 1957 — Section 40 of Finance Act, 1983.

FACTS

The assessee, Champa Properties Ltd. were assessable to tax for the A.Ys. 1984-85 and 1985-86 u/s 40 of the Finance Act, 1983. The assessee, on the valuation dates, owned a house property at 36A, Shakespeare Sarani, Calcutta, and the value of the above property was to be assessed under the above section. The Assessing Officer determined the value of the house property on the basis of the 'net maintainable rent' under rule 1BB of the Wealth-tax Rules, 1957. Before the Assessing Officer, the assessee claimed deduction of Rs.72,000/- while working out the 'net maintainable rent'. The said amount was payable to three lessees at the rate of Rs.2,000/- per month as per agreement under which these lessees permitted the assessee to let out the property at a higher rent. The WTO rejected the claim of the assessee and added Rs.72,000 while computing the value of the house property under rule 1BB. The Tribunal, after considering the definition of 'maintainable rent' under rule 1BB (2)(a) held that the amount of Rs. 72,000/- was deductible while determining the net maintainable rent. The Assessing Officer also added Rs.5,13,566/- and Rs. 5,83,183/- respectively, in the net wealth of the assessee for the A.Ys. 1984-85 and 1985-86. The Assessing Officer found that the assessee had shown the above amounts of unpaid corporation taxes as liabilities in the balance sheet of the relevant period. According to the Assessing Officer, the amounts of unpaid corporation taxes were utilised by the assessee by way of loans and advances and deposits in banks as also for acquiring shares. That Wealth-tax Officer held said deposits and investments were debts secured on house property and therefore, liable to be included in the totaL wealth of the assessee. The Tribunal found that the Assessing Officer had duly allowed deduction of unpaid corporation taxes as liabilities. It further held that the assessee might have utilised some funds for acquiring assets which would not have been available if the liability to house tax had been discharged. But the undischarged liabilities towards municipal taxes could not be treated as a debt secured on one or more assets taxable under clause (viii) of sub-section (3) of section 40 of the Finance Act, 1983. It accordingly held that the assets mentioned by the Assessing Officer like advances to parties, shares or deposits in bank etc. were clearly not covered by clauses (b) to (vii) of the aforesaid sub-section (3). Therefore, the addition made by the Assessing Officer was unjustified.

DECISION

The Hon'ble Court held that so far as first question is concerned, the finding of the Tribunal is that the revenue never disputed the genuineness of the

agreement dated 15.6.1971, by and between the assessee and the three lessees. It was also not in dispute that the agreement has been acted upon. Having regard to the aforesaid findings of the Tribunal which have not been challenged, the conclusion is inevitable that the WTO was not justified in adding the sum of Rs.72,000/- in determining the 'net maintainable rent' under rule 1BB. As regards the second question, the Assessing Officer allowed deduction of unpaid corporation taxes as liabilities. It is nobody's case that such liabilities are not deductible. It may be that the assessee, by not discharging the liabilities, could have some funds for acquiring the assets, but, by no stretch of imagination, can it be said that undischarged liabilities towards municipal taxes can be treated as a debt secured on one or more assets taxable under clause (viii) of sub-section (3) of section 40 of the Finance Act, 1983. None of the clauses (i) to (vii) is applicable to the facts of this case. The assessee has not, by reason of not paying the taxes acquired any asset by any debt secured on any one or more of the assets referred to in clauses (i) to (viii).

Full text of the Judgment is given below :

JUDGMENT

(A.K. Sengupta, J.)

In this reference under section 27(1) of the Wealth-tax Act, 1957 ('the Act') for the assessment years 1984-85 and 1985-86, the following questions of law have been referred to this Court:

"1. Whether, on the facts and in the circumstances of the case the Tribunal was right in law in upholding the deduction of Rs.72,000 in computing the net maintainable rent under rule 1BB of the Wealth-tax Rules, 1957?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that Rs.5,13,566 and Rs.5,88,138 could not be assessed to the wealth-tax under sub-section (3) of section 40 of the Finance Act, 1983, in the assessment years 1984-85 and 1985-86 respectively?

The facts leading to this reference are that the assessee, Champa Properties Ltd., were assessable to tax for the assessment years 1984-85 and 1985-86 under section 40 of the Finance Act, 1983. The assessee, on the valuation dates, owned a house property at 36A, Shakespeare Sarani, Calcutta and the value of the above property was to be assessed under the above section. The Assessing Officer determined the value of the house property on the basis of the 'net maintainable rent' under rule 1BB of the Wealth-tax Rules, 1957 ('the Rules').

Before the Assessing Officer, the assessee claimed deduction of Rs.72,000 while working out the 'net maintainable rent'. The said amount was payable to three lessees at the rate of Rs.2,000 per month as per agreement under

which these lessees permitted the assessee, to let out the property at a higher rent. The WTO rejected the claim of the assessee and added Rs. 72,000/- while computing the value of the house property under rule 1BB.

The assessee, being aggrieved, challenged the above addition before the Commissioner (Appeals) and contended that similar additions of Rs.72,000 made under the Income-tax Act, 1961, for the assessment years 1977-78 to 1980-81, were deleted in appeal. The Commissioner (Appeals) directed that deduction as claimed by the assessee should be granted in line with the relief granted in the income-tax case. He directed the WTO to revalue the property according to the correct procedure.

The revenue challenged the above direction of the Commissioner (Appeals) before the Tribunal. The Tribunal found that the premises at 36A, Shakespeare Sarani, Calcutta were let out to three persons ('the lessees') at a certain rent for 20 years from 1.8.1966. Later on, the assessee-company was able to secure higher rent and, therefore, agreements were arrived at between the assessee and the lessees to share the higher receivable rent. The lessees under the agreements permitted the assessee to let out the house property at a higher rent subject to payment of Rs.2000 per month to each of the lessees. On account of the above, a sum of Rs. 72,000 payable to the lessees was deducted from the gross receivable rent while-declaring income of the house property in question.

The Assessing Officer, under the Income-tax Act, treated Rs.72,000 as 'application of income' and, therefore, not deductible in determining the annual letting value of the property under sections 22 and 23 of the Income-tax Act. However, on appeal, the Tribunal, in the assessee's case for the assessment years 1982-83 and 1983-84 as per order dated 1.1.1988, deleted the addition.

The Tribunal, while hearing the appeal under the Act, followed the order dated 7.1.1988 and upheld the orders of the Commissioner (Appeals). The Tribunal after considering the definition of 'maintainable rent' under rule 1BB(2)(a) held that the amount of Rs.72,000 was deductible while determining the net maintainable rent.

The Assessing Officer also added Rs. 5,13,566 and Rs.5,83,183 respectively in the net wealth of the assessee for the assessment years 1984-85 and 1985-86. The Assessing Officer found that the assessee had shown the above amounts of unpaid corporation taxes as liabilities in the balance sheet of the relevant period. According to the Assessing Officer, the amounts of unpaid corporation taxes were utilised by the assessee by way of loans and advances and deposits in banks as also for acquiring shares. The said deposits and investments were debts secured on house property and, therefore, liable to be included in the total wealth of the assessee. On appeal, the addition made was deleted by the Commissioner (Appeals).

The revenue challenged the deletion of the amounts in appeal before the Tribunal. The Tribunal found that the Assessing Officer had duly allowed deduction of unpaid corporation taxes as liabilities. It further held that the assessee might have utilised some funds for acquiring assets which would not have been available if the liability to tax had been discharged. But the undischarged liabilities towards municipal taxes could not be treated as a debt secured on one or more assets taxable under clause (viii) of sub-section (3) of section 40 of the Finance Act, 1983. It accordingly held that the assets mentioned by the Assessing Officer like advances to parties, shares or deposits in banks etc. were clearly not covered by clauses (i) to (vi) of the aforesaid sub-section (3). The Tribunal, accordingly, held that one of the clauses (i) to (viii) was applicable to the facts of the case and, therefore, the addition made by the Assessing Officer was unjustified. The addition was rightly deleted by the Commissioner (Appeals). With the above observations, the Tribunal upheld the action of the Commissioner (Appeals) deleting the addition of Rs. 5,13,565 and Rs.5,83,183 for the assessment years 1984-85 and 1985-86, respectively.

So far as the first question is concerned, the finding of the Tribunal is that the revenue never disputed the genuineness of the agreement dated 15.6.1971, by and between the assessee and the three lessees. It was also not in dispute that the agreement has been acted upon. The Tribunal, in its order for the assessment years 1982-83 and 1983-84 in the income-tax appeal, observed as follows :

> "In the instant case, the lease rent payable as per original agreement dated 6.5.1966, as modified by deed dated 16.9.1966, by each of the three lessees at Rs.1,000 per month has been deducted by the Income-tax Officer in computing the disallowance of Rs.72,000 by deducting Rs.1,000 from the sum payable of Rs.3,000 as fixed in the agreement dated 15.6.1971, entered into by the assessee with each of the three partnership firms i.e. Rs.3,000 - Rs.1,000 = 2,000 x 3 x 12 = Rs. 72,000. He considered the extra sum paid Rs.2000 to each of the three lessees as 'an application of income' on the ground that the same was paid after the income was earned by the assessee. In fact before the agreement with the Government of India for renting out the entire premises was executed, the assessee entered into three separate agreements with the lessees for obtaining vacant possession of the building in order to fetch higher rental income from the tenant, i.e. the Department of Rehabilitation Branch Secretariat, Government of India. The agreement dated 15.6.1971, which the assessee entered into with each of the three lessees has not been found sham or ingenuine by the authorities below. That being so, we hold that the Income-tax Officer was not justified in including Rs.72,000 to the assessee's house property income as, in our opinion, the said sum did not form part of the assessee's income by virtue of the agreements entered into by

the assessee with each of the three lessees, dated 15.6.1971. We, accordingly, uphold the Commissioner of Income-tax (Appeals)'s order for each of the assessment years under appeal and dismiss the departmental appeals."

In our view, having regard to the aforesaid findings of the Tribunal which have not been challenged, the conclusion is inevitable that the WTO was not justified in adding the sum of Rs.72,000 in determining the 'net maintainable rent' under rule IBB.

We, therefore, answer the first question in the affirmative and in favour of the assessee.

We now turn to the second question.

Section 40 of the Finance Act has revived, in a limited way, the levy of wealth-tax on companies which was suspended by the Finance Act, 1960.

For the purposes of determining the net wealth of the Company, the value of only the following assets will be taken into account, namely :

(i) gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals ;

(ii) precious or semi-precious stones whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel;

(iii) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(iv) utensils made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals ;

(v) land other than agricultiural land ;

(vi) building or land apputenant thereto, other than building or part therof used by the assessee as factory, godown, warehouse, hotel or office for the purposes of its business or as residential accommodation for its employees whose income (exclusive of the value of all benefits or ameneties not provided for by way of monetary payment) chargeable under the head 'Salaries' does not exceed Rs.18,000 or as a hospital, creche, school, canteen, library, recreational centre, shelter, rest room mainly for the welfare of such employees and the land appurtenant thereto ;

(vii) motor cars ; and

(viii) any other asset which is acquired or represented by a debt secured on any one or more of the assets referred to in clauses (i) to (vii) above.

To illustrate, if a company has obtained a loan on the security of gold owned

by it and has acquired, with the amount of the loan, shares in any other company, the value of such shares would be liable to wealth-tax in the assessment of the company.

In the instant case, the Assessing Officer allowed deduction of unpaid corporation taxes as liabilities. It is nobody's case that such liabilities are not deductible. The assessee is entitled to get the deduction of liabilities of corporation taxes even though unpaid as these are liabilities on the respective valuation dates. It may be that the assessee, by not discharging the liabilities, could have some funds for acquiring the assets, but, by no stretch of imagination, can it be said that undischarged liabilities towards municipal taxes can be treated as debt secured on one or more assets taxable under clause (viii) of sub-section (3) of section 40 of the Finance Act, 1983. None of the clauses (i) to (vii) is applicable to the facts of this case. The assessee has not by reason of not paying the taxes, acquired any asset by any debt secured on any one or more of the asseets referred to in clauses (i) to (vii).

The assessee, no doubt, made provision for taxes and might have utilised the funds for acquiring other assets which, if the liability to tax were discharges, was not available to the assessee, but those assets are shown in the balance sheet. In the annexure, only assets mentioned in sub-section (3) are chargable to wealth-tax. It appears that the WTO made addition under clause (viii) of sub-section (3) which is as under :

> "(viii) any other asset which is acquired or represented by a debt secured on any one or more of the assets referred to in clause (i) to clause (vii)."

Thus, provison for undischarged liabilities towards municipal taxes was treated as a debt secured on one or more assets referred to in clauses (i) to (vii). But the assets mentioned by the WTO like advances to parties, shares or deposits in banks are clearly not covered by clauses (i) to (vii) of sub-sectionn (3). That apart, provison for unpaid disputed liability cannot be treated as a debt secured on any asset of the company. Municipal liability was admitted to be a debt incurred in relation to the house properties brought to charge as assets.

For the reasons aforesaid, the second question is answered in the affirmative and in favour of the assessee. There will be no order as to costs.

Shyamal K. Sen, J.— I agree.

(1995) 126 Taxation 445 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Suhas Chandra Sen &
Hon'ble Mr. Justice Bhagabati Prasad Banerjee)

IT Reference No. 600 of 1979

Commissioner of Income-tax
vs.
Jiyajeerao Cotton Mills Ltd.

For the Appellant	:	**A.C. Moitra & R.C. Prosad**
For the Respondent	:	**Dr. D. Pal, J.P. Khaitan, R.N. Bajoria and A.K. Dey**
Decided on	:	25-1-1990

DEDUCTIONS — Assessee claiming relief u/s 80-I in respect of its unit engaged in priority industry — ITO deducting propotionate managing agency commission from profits before working out relief u/s 80-I — Held, proportionate manging agency commission could be deducted in computing profits and gains attributable to priority industry for granting deduction u/s 80-I.

Income-tax Act, 1961 — Section 80-I.

FACTS

The A.Ys. involved are 1968-69 and 1969-70. The assessee claimed relief u/s 80-I of the Income-tax Act in respect of its unit, Sourastra Chemicals. There is no dispute that the aforesaid unit had been engaged in a priority industry and the assessee was entitled to relief u/s 80-I in respect thereof. For the A.Y. 1968-69 the assessee company started its computation with reference to the loss of Rs.19,17,512/- as per profit and loss account and net profit was computed at Rs. 26,31,123/- and 8% thereof was worked out to Rs. 2,10,489/-. The profit as per profit and loss account for the A.Y. 1969-70 was Rs.75,75,429/-, net profit was computed at Rs.98,75,356/- and 8% thereof was worked out to Rs.7,50,023/-. The assesseee arrived at net profit for the A.Ys. 1968-69 and 1969-70 for the purpose of section 80-I after deducting proportionate managing agency commision of Rs.1,85,061/- and Rs.5,89,130/- respectively. Development rebates of Rs.20,79,000/- and Rs.3,57,600/- for the respective two A.Ys. were added to the profits disclosed as per profit and loss account or deducted from the loss as per profit and loss account. The ITO computed the profit for the two A.Ys. at Rs. 9,79,120/- and Rs.86,580/- respectively. The ITO allowed the assessee in regard to the deduction of proportionate manging remuneration for the purpose of section 80-I but unlike the assessee he deducted the development rebate for finding out the net profit in order to compute the relief u/s 80-I. The ACC expressed inability to accede to the assessee's submission.

According to him, the profit and gains of a priority industry for the purpose of section 80-I should be computed after taking into account the deductions specified in sections 28 to 44 and as the ITO had actually done so, he refused to interfere with the matter. The assessee also contended before the Tribunal that though it had deducted proportionate managing agency remuneration in its computation for the assessment years 1968-69 and 1969-70, the ITO should have applied the proper law following the decision of the Supreme Court in CIT vs. C. Parakh & Co. (India) (1956) 29 ITR 661. The Tribunal held that the assessee should be entitled to further relief u/s 80-I in respect of proportionate manging agency commission of Rs.1,85,061/- and Rs.5,89,130/-. For attaining this relief, the Tribunal was in completer agreement with the contention taken up by the learned counsel for the assessee who relied on the decisions of the Supreme Court in CIT vs. C. Parakh & Co. (India) Ltd. (1956) 29 ITR 661 and CIT vs. Maharashtra Sugar Mills Ltd. (1971) 82 ITR 452. It is now well settled that the income-tax authorities must not deduct propotionate managing agency commission while computing income of a branch.

DECISION

The Hon'ble Court held that the principles laid down by the Supreme Court in the aforesaid cases clearly apply to the facts of the instant case. It is not the case of the revenue that various units of business carried on by the assessee independently are separate business concerns. The assessee had relied on the aforesaid judgments of the Supreme Court before the Tribunal. No attempt was made to distinguish these judgments on the ground that the business carried on by the assessee were separate and independent transactions. In view of the principles laid down by the Supreme Court in the aforesaid two judgments both the questions are answered in the negative and in favour of the assessee.

Cases referred to :

1. *CIT vs. C. Parakh & Co. (India) Ltd.* (1956) 29 ITR 661 (SC)
2. *CIT vs. Maharashtra Sugar Mills Ltd.* (1971) Taxation XXXI (1) 260 (SC) (1971) 82 ITR 452 (SC).

Full text of the Judgment is given below :

JUDGMENT

(S.C. Sen, J.)

The Tribunal has referred the following questions of law to this Court under Section 256(2) of the Income-tax Act, 1961 ('the Act').

"1. Whether, on the facts and in the circumstances of the case, the Tribunal misdirected itself in holding that the assessee is entitled to relief under section 80-I in respect of proportionate managing

agency commission amounting to Rs.1,85,061 for the assessment year 1968-69?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that relief/deduction under section 80-1 should be allowed with reference to the profit and gains from priority industry without deducting proportionate managing agency commission therefrom?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that for the purpose of allowing deduction or relief under section 80-1 of the Income-tax Act, 1961 commercial or accounting profits should be taken to be the actual profits?

4. Whether, on the facts and in the circumstances of the case, the Tribunal having held that the accounting profits as worked out by the assessee should be the commercial profits for the purpose of section 80-I of the Income-tax Act, 1961, the conclusion of the Tribunal that the assessee is entitled to additional deduction under section 80-1 of the said Act in respect of the proportionate managing agency commission that had been allowed as deduction in computing the business income if the assessee is unreasonable and/or perverse?"

The assessment years involved are 1968-69 and 1969-70. The acconting period are years ended on 31.3.1968 and 31.3.1969, respectively.

In the statement of the case the Tribunal has also mentioned three other questions in paragraph 4 as to have been directed to be referred in Matter No. 189 of 1978. But it appears in the order passed by this Court that the Rule was issued only in respect of the question which has been referred hereinabove and the Rule was made absolute with regard to that question in a proceeding under section 256 (2).

It appears from the records of section 256(2) proceedings, being Matter No. 189 of 1978, that a Rule was issued in respect of all the four questions by the revenue by order dated 18.9.1978. Ultimately when the case was taken up for final hearing the Rule was made absolute only on question No.1 which has been set out hereinabove. Rule in respect of all other questions was discharged.

The facts out of which the controversy arose have been stated by the Tribunal as under :

"The assessee claimed relief under section 80-I of the Income-tax Act, 1961 in respect of its unit Sourastra Chemicals. There is no dispute that the aforesaid unit had been engaged in a priority industry and the assessee was entitled to relief under section 80-I in respect thereof. The assessee submitted to the ITO its computation of relief under section

80-I and the amount of relief claimed was Rs. 2,10,489 and Rs. 7,90,028 for the assessment years 1968-69 and 1969-70, respectively. For the assessment year 1968-69 the assessee company started its computation with reference to the loss of Rs.19,17,512 as per profit and loss account and net profit was computed at Rs. 26,31,123 and 8 per cent thereof was worked out to Rs.2,10,489. The profit as per profit and loss account for the assessment year 1969-70 was Rs. 75,75,429, net profit was computed at Rs.98,75,356 and 8 per cent thereof was worked out to Rs.7,50,023. The assessee arrived at net profit for the assessment years 1968-69 and 1969-70 for the purpose of section 80-I after deducting proportionate managing agency commission of Rs.1,85,061 and Rs.5,89,130 respectively. Development rebates of Rs.20,79,000 and Rs.3,57,600 for the respective two assessment years were added to the profits disclosed as per profit and loss account or deducted from the loss as per profit and loss account. Similarly, in working out the profit for purpose of section 80-1 the assessee added the interest paid to head office or deducted from the loss as per profit and loss account of such interest paid to head office. Interest paid to head office was Rs.25,12,850 and Rs. 21,83,355 for the assessment years 1968-69 and 1969-70 respectively.

The ITO, on the other hand, computed the profit for the two assessment years at Rs. 9,79,120 and Rs. 86,580 respectively. Relief was worked out by applying 8 per cent of the aforesaid amount of net profit for each of the assessment years. He took net profit as per profit and loss account for the respective assessment years at Rs.5,95,338 and Rs. 97,63,784. The ITO allowed the assessee in regard to the deduction of proportionate managing remuneration for the purpose of section 80-I but unlike the assessee he deducted the development rebate for finding out the net profit in order to compute the relief under section 80-I. There was slight difference in ITO's computation of development rebate allowable to the assessee. These figures for the respective assessment years were Rs. 20,79,082 and Rs. 8,57,613. In this regard it may be mentioned that the assessee credited development rebate reserve by debiting the profit and loss account with amount equivalent to development rebate.

Being aggrieved, the assessee appealed before the AAC and contended before him that the deduction under section 80-I should have been allowed with reference to the profit and gains from the priority industry without deducting development rebate and proportionate managing agency commission from the same. It was submitted that the deduction had to be worked out on the profit and gains of the priority industry and not on the assessable income. In regard to the development rebate it was the assessee's case that extra benefit or incentive to the assessee should not be treated as an expenditure necessary for working out the

profits and similarly proportionate managing agency remuneration should not also have been deducted. The AAC expressed inability to accede to the assessee's submission. According to him, the profit and gains of a priority industry for the purpose of section 80-1 should be computed after taking into account the deductions specified in sections 28 to 44 and as the ITO had actually done so he refused to interfere with the matter. The assessee felt aggrieved by the AAC's decision and preferred appeals before the Appellate Tribunal.

Before the Tribunal the assessee objected to the decision taken by the AAC on the ground that development rebate was not normal business expenditure but a benefit extended to the assessee only on fulfilling pre-requisite conditions. According to the assessee, section 80-I envisages relief as an encouragement to the companies engaged in priority industries under certain specified conditions. It was contended that the profit and gains attributable to a priority industry need not be computed after allowing all the deductions admissible in computing the business income under sections 30 to 43 of the Income-tax Act, 1961. The assessee also contended before the Tribunal that though it had deducted proportionate managing agency remuneration in its computation for the assessment years 1968-69 and 1969-70, the ITO should have applied the proper law following the decisions of the Supreme Court in *CIT v. C. Parakh & Co. (India) Ltd.* (1956) 29 ITR 661 and *CIT vs. Maharashtra Sugar Mills Ltd.* (1971) 82 ITR 452".

The Tribunal held :

"After going through the authorities cited before us and considering all the rival submissions on the basis of the facts and circumstances of the case, we are of the opinion that the assessee should be entitled to further relief under section 80-I in respect of proportionate managing agency commission of Rs.1,85,061 and Rs.5,89,130 for the assessment years 1968-69 and 1969-70 respectively. For attaining this relief, we are in complete agreement with the contention taken up by the learned counsel for the assessee who relied on the decisions of the Supreme Court in *CIT vs. C. Parakh & Co. (India) Ltd.* (1956) 29 ITR 661 and *CIT vs. Maharashtra Sugar Mills Ltd.* (1971) 82 ITR 452. It is now well-settled that the income-tax authorities must not deduct proportionate managing agency commission while computing income of a branch. In other words, managing agency commission payable by a company to its managing agents related to the finally determined profits of the company. In the instant case before us the assessee-company paid managing agency commission to Birla Gwalior Ltd. The assessee might have debited such proportionate managing agency commission in the accounts of its different units. But this would not in our opinion prevent the assessee from availing of the benefit which is otherwise due to it under the law. Therefore, we direct the ITO to

revise his orders for the aforesaid two assessment years, i.e. 1968-69 and 1969-70 by allowing additional deduction under section 80-I in respect of the proportionate managing agency commission to the assessee".

Section 80 is one of the sections in Chapter VIA of the Act. The scheme of the Act is that the total income of an assessee is first to be computed in accordance with the provisions of the Act after arriving at the gross total income. The deductions mentioned in the sections in Chapter VIA are to be allowed for the purpose of finding out the total income of an assessee No deductions are to be made under any of these sections included in Chapter VIA at the time of computation of the total income. Section 80-I, clause (i) provided as follows :

"The company to which this section applies, where the gross total income includes any profits and gains attributable to any priority industry, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction from such profits and gains of an amount equal to eight per cent thereof, in computing the total income of the company."

There is no dispute in this case that only such amount of the profits and gains attributable to any priority industry which has been included in the gross profit will qualify for exemption under section 80-I. The only dispute, however, is how to compute 'profits and gains attributable to any priority industry'.

It is the contention of the revenue that profits and gains of priority industry must be profits and gains after deduction of all expenditures. This proposition cannot be disputed. There are many expenditures of the company which are not only in respect of priority industry but also in respect of other industries under the management of the company. One of such expenditure is the payment made to the managing agents. The revenue's contention is that the proportionate income of the managing agency by way of commission must be deducted from the profits of the priority industry to find out the profits and gains of priority industry for the purpose of computation of relief under section 80-I. That raises the question : What is the profit and gain attributable to any priority industry?

In this connection the two judgements of the Supreme Court on which reliance has been placed by the Tribunal are instructive. The first judgment is in the case of *CIT vs. C. Parakh & Co. Limited* (1956) 29 ITR 661. This judgment relates to deductibility of commission of a portion of the managing agency commission from the business carried on by the assessee, *inter alia*, in Pakistan for the purpose of computation of profits in Pakistan. There the assessee carried on some business at a number of places. The net profits of the business had to be ascertained by putting together the profits of all the branches and deducting therefrom all the expenses. The fact that some of the branches were in foreign territories did not make

any difference to the position because the assessee was an ordinary resident within the taxable territories'. The Supreme Court held that whether the assessee was entitled to a particular deduction or not would depend on the provisions of law relating thereto and not on the view which the assessee might take of its rights. In that case the assessee company had its head office at Bombay and maintained a branch office at Karachi for purchasing cotton for shipment to Bombay or for export direct to other places. The managing agents of the assessee-company were entitled to a remuneration of 20 per cent of the net annual profits of the assessee-company. The assessee had apportioned the managing agency commission and debited the proportionate amount in the respective profits and loss accounts for the Bombay head office and the Karachi Branch. In computing the Pakistani income of the assessee for the purpose of double taxation relief, the ITO deducted from the income of the Karachi Branch the proportionate managing agency commission. The AAC confirmed the order. But the Tribunal and the High Court on a reference held that the managing agency commission in its entirety should be debited to the Bombay Branch. It was held by the Supreme Court that the profits earned in India and Karachi were to be thrown together and the expenses including the managing agency commission deducted therefrom and, therefore, the assessee- company was entitled to deduct the entire commission against the Indian profits. The Supreme Court further held that the appropriation of the proportionate commission in respect of profit earned at Karachi was not in accordance with the agreement or with the rights of the assessee under the law. It was observed by Venkatarama, J. :

> "Under that agreement, the managing agents are entitled to a 20 per cent commission on the annual net profits of the company, and to ascertain those profits, one has to take into account the result of the trade in all its branches. In the present case, profits were earned during the accounting period both in Bombay and in Karachi, and the apportionment of the commission between the two branches makes no material difference in the result. But it might happen that the business at Bombay results in profit, while that at Karachi ends in loss. In that event, what the managing agents would be entitled to would be commission not on the profits made in Bombay but on the net profits after setting off the loss in the Karachi Branch against the profits of the Bombay business. And that would also be the position if the business at Bombay resulted in loss, while that at Karachi ended in profit. The appropriation, therefore of Rs.1,23,719 as proportionate commission in respect of the profits of Rs.6,18,599 earned at Karachi in the profit and loss statement for the branch is not in accordance with the terms of the managing agency agreement, or with the rights of the respondent under the law." (p. 666)

In the recent case *CIT vs. Maharashtra Sugar Mills Ltd.* (1971) 82 ITR

452 (SC) the assessee-company owned extensive lands on which it grew sugarcane and used the sugarcane for manufacture of sugar in its factory. The Tribunal found that the cultivation of sugarcane and the manufacture of sugar by the assessee constituted one single and indivisible business. The question was whether a part of the managing agency commission paid by the company could be allowed on the ground that the part related to the management of sugarcane cultivation income from which was exempted from tax as agricultural income. It was held by the Supreme Court that the entire managing agency commission was laid out or expended for the purpose of business carried on by the assessee and was allowable under section 10(2) (xv) of the Indian Income-tax Act, 1922. The fact that the income from a part of the business was not exigible to tax under the Act was not a relevant circumstance. The Supreme Court pointed out that equitable consideration was wholly out of place in construing the provisions of a taxing statute. If the allowance claimed is permissible under the Act, then the same has to be deducted from the profits.

The principles laid down by the Supreme Court in the aforesaid cases clearly apply to the facts of the instant case. It is not the case of the revenue that various units of business carried on by the assessee independently are separate business concerns. The assessee had relied on the aforesaid judgments of the Supreme Court before the Tribunal. No attempt was made to distinguish these judgments on the ground that the business carried on by the assessee were separate and independent transactions.

In view of the principles laid down by the Supreme Court in the aforesaid two judgments, both the questions are answered in the negative and in favour of the assessee.

There will be no order as to costs.

Banerjee, J. I agree.

(1995) 126 Taxation 452 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit Kumar Sengupta & Hon'ble Mr. Justice Shyamal Kumar Sen)

PMAT No. 1675 of 1989

Smt. Uma Devi Jhawar

vs.

Income-tax Officer

For the Appellant : **A.K. Dey**
For the Respondent : **R.C. Prosad**
Decided on : 23-12-1992

REASSESSMENT — Assessee purchasing piece of land and

constructing a house thereon — During the course of assessment assessee disclosing the fact of purchase and construction — Books of acounts maintained for cost of construction supported by vouchers — Assessment completed — After completion of assessment, matter referred to Govt. valuer — Govt. valuer estimating cost at a higher value — Assessment reopened on the basis of valuer's report — Held, notice u/s 148 not a show cause notice — Notice can be issued if all the conditions precedent for assumption of jurisdiction satisfied — Accounts cannot be rejected without pointing out defects — Valuation Report not a basis of cost of construction — Recorded reasons proposing reopening of assessment sent to CIT are not prejudicial documents and assessee entitled to inspection — Issue of notice struck down.

Incom-tax Act, 1961 — Section 147.

FACTS

Shortly stated, the facts are that in the year 1964 the writ appellant purchased a piece of land at Calcutta for a consideration of Rs. 86,000. In July 1966, the appellant started construction of a house thereon which was completed in October 1968. The said building was constructed at a total cost of Rs. 1,46,363.11 paid by the appellant in four years from 1967-68, the appellant furnished details of the said cost of construction in each year and also filed a valuation report dated 21.11.1968 of J. Ganguli & Co. Surveyor & Valuer. In this connection, the appellant also filed a letter dated 16.3.1972 explaining the cost of construction. By an order of assessment dated 23.3.1972 made u/s 143(3) of the Act the appellant was assessed for the said A.Y. 1967-68. On 31.3.1976, the appellant received a notice dated 31.3.1976 issued u/s 148 for the A.Y. 1967-68 wherein the ITO alleged that he had reason to believe that the income of the appellant for the said A.Y. had escaped assessment within the meaning of section 147 of the Act which he proposed to reassess. The appellant by a letter dated 27.4.1976 protested against the said notice dated 31.3.1976 and required the ITO to disclose the reasons for the said notice. No reply was given by the ITO.

DECISION

The Hon'ble Court considered the rival contentions. Notice u/s 148 is not a show cause notice. Such a notice can be issued only if the conditions precedent for assumption of jurisdiction u/s 147(a) are satisfied. For invocation of jurisdiction u/s 147(4), two conditions are to be satisfied, firstly, the ITO has reasons to believe that income, profits or gains chargeable to income-tax have escaped assessment, and secondly, he must have also reasons to believe that such escapement has occurred by reasons of either (i) omission or failure on the part of the assessee to make a return of his income u/s 139 or (ii) omission or failure on the part of the assessee to

disclose fully and truly all material facts necessary for his assessment for that year. Both the conditions are conditions precedent to be cumulatively satisfied before the ITO could assume jurisdiction to issue notice u/s 148, read with section 147(a). When the validity of a notice issued u/s 148 is in challenge, it is for the ITO to satisfy the Court that the aforesaid conditions have been satisfied. The expression 'reason to believe' means that there is a reason coupled with the belief. It is, therefore, open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing on the formation of belief and are not extraneous or irrelevant to the purpose of Section 147 (a).

The materials having a natural nexus to the formation of belief has to be disclosed by the ITO. The recorded reasons or materials or the letter of proposal sent by the ITO to the CIT are not privileged documents. There cannot be a ground for reopening the assessment holding that the assessee did not disclose the cost of construction or that the difference between the cost of construction shown by the assessee and subsequently estimated by the departmental valuer represents undisclosed investment. This is not a case where a proceeding can be initiated u/s 147(a). The ITO in assuming jurisdiction did not have any *prima facie* ground for thinking that there had been any non-disclosure of material facts. In any event valuation is always a question of opinion and unless there is a clear finding on the basis of the materials that the assessee invested in the construction of the house property more than what had been shown by her in course of the assessment proceedings, the ITO cannot proceed merely on the basis of the valuation report of the departmental valuer.

Cases referred to :

1. *Ganga Saran & Sons (P) Ltd. vs. ITO* (1981) Taxation 61 (3) 126, (1981) 130 ITR 1 (SC)
2. *Smt. Tarawati Debi Agarwal vs. ITO* (1986) 162 ITR 606 (Cal)
3. *Rasiklal Jivanlal Shah vs. ITO* (1982) 133 ITR 476 (Cal)

Full text of the Judgment is given below :

JUDGMENT

(A.K. Sengupta, J.)

This appeal is directed against the judgement and order dated 17.5.1989 passed by the Court of the first instance on a writ petition filed by the appellant. In the said writ petition, Smt. Uma Devi Jhawar, the appellant/writ petitioner challenged the validity of a notice dated 31.3.1976 issued by the ITO, 'K' Ward Companies District-I, Calcutta, under section 148 of the Income-tax Act, 1961 ('the Act') for the assessment year 1967-68. By the aforesaid judgment and order dated 17.5.1989 the said writ petition was dismissed.

Shortly stated, the facts are that in the year 1964 the writ appellant purchased a piece of land at No. 24B, Carcha Road, Calcutta (also numbered as 51E, Gariahat Road, Calcutta) for a consideration of Rs.86,000. In July 1966, the appellant started construction of a house thereon which was completed in October 1968. The said building was constructed at a total cost of Rs.1,46,363.11 paid by the appellant in four years from 1967 to 1970.

In course of the assessment proceedings for the said assessment year 1967-68, the appellant furnished details of the said cost of construction in each year and also filed a valuation report dated 21.11.1968 of J. Ganguli & Co. Surveyor and Valuer. In this connection, the appellant also filed a letter dated 16.3.1972 explaining the cost of construction.

By an order of assessment dated 23.3.1972 made under section 143(3) of the Act the appellant was assessed for the said assessment year 1967-68 on a total income of Rs. 13,670.

In course of the said assessment proceedings the appellant disclosed the fact of purchase and construction of the said house property. It is relevant to point out here that in the assessment for the assessment year 1969-70, the ITO on the basis of valuation report dated 21.11.1968 estimated the said cost of construction of the said house property and made an addition of Rs. 48,182. The said addition was deleted by the AAC by his order dated 17.10.1973. The department preferred appeal to the Tribunal. The Tribunal by its order dated 26.3.1975 dismissed the said appeal of the department and held, *inter alia*, that before the ITO books of account maintained for the construction and other details supported by vouchers were produced. The ITO had not pointed out any defect in the accounts or bills produced. Hence, the said accounts could not be rejected. In the circumstances, the appeal was dismissed.

On 31.3.1976, the appellant received from the respondent No.2 (ITO) a notice dated 31.3.1976 issued by him under section 148 for the assessment year 1967-68 wherein the respondent No.2 alleged that he had reason to believe that the income of the appellant for the said assessment year had escaped assessment within the meaning of section 147 of the Act which he proposed to reassess and, hence, required the appellant to file return for the said assessment year. It was alleged that the said notice was issued after obtaining the satisfaction of the respondent No.3 (Commissioner, West Bengal XII, Calcutta).

The appellant by a letter dated 27.4.1976 protested against the said notice dated 31.3.1976 and required the ITO to disclose the reasons for the said notice. No reply was given by the ITO.

On 25.5.1976, the writ petition herein was moved challenging the legality and validity of the said notice dated 31.3.1976, when a rule nisi and interim order was granted by this Court.

The writ petition came up for hearing in May 1989 before the Court of the first instance when, it appears, no one appeared for the respondents, no affidavit on behalf of the respondents was filed and no records were produced. In the aforesaid circumstances, the hearing was concluded and the matter was posted for judgment on 17.5.1989.

On 17.5.1989, the respondents appeared before the Court of the first instance and produced some records and prayed for time to file affidavit in opposition, which was disallowed. No copy of the recorded reasons produced was given to the appellant nor the same were disclosed to the appellant's counsel. The learned Judge was pleased to go through the records produced by the respondents. The appellant's counsel appearing was not called upon to make any submission with reference to the records produced by the respondents, in spite of request for the same made by the appellant's counsel.

The learned Judge by the judgment and order dated 17.5.1989 dismissed the writ petition.

The learned Judge was of the view that even the records produced do not contain any material so as to effectively help in the adjudication of the matter in dispute.

Records produced showed that reasons have been recorded that inasmuch as on a plot of land at 51/1 Gariahat Road, there was construction of a house during the financial years 1966-67 to 1968-69 and the assessee had disclosed the costs of construction thereof at Rs. 1,46,363. The Officer being Valuation Officer of the Income-tax Department had determined the cost of such construction at Rs. 2,84,000 and since there is a gap of Rs. 1,37,637 and since there is concealment of income, the ITO had reasons to believe that the income of Rs. 22,664 had escaped assessment for the year 1967-68.

Thus, the Court was satisfied upon looking into the relevant files that the grievance of the appellant as to the issuance of the notice under section 148 was not justified. Sufficient opportunity was given to her to show cause pursuant to the said notice and the writ Court will not come to her aid and the appellant was not entitled to relief. The writ petition was without merit and dismissed.

Dr. Pal, the learned Advocate appearing for the appellant, has contended that the judgment under appeal was made in gross violation of the principles of natural justice inasmuch as the Court of the first instance looked into and considered the records produced by the respondents, only at the time of judgement and not before, without allowing the petitioner a copy thereof or inspection thereof or any opportunity to make its submissions on the said records or alleged recorded reasons.

It is his contention that the learned Judge should not have considered the

said records without allowing the petitioner an opportunity to make her submissions. It is the contention of Dr. Pal that inasmuch as the writ petitioner was not allowed to make submission with reference to the records, the attention of the Court could not be drawn to the order of the Tribunal dated 25.3.1975 which was part of the writ petition. It is contended that the findings contained in the said order of the Tribunal would go to show that all material and primary facts relating to the construction of the said house were disclosed fully and truly by the assessee in course of the original assessment proceedings.

Dr. Pal has also assailed the judgment under appeal contending that the learned Judge failed to appreciate that a notice under section 148 was a jurisdictional notice and not a show-cause notice. Dr. Pal further contended that inasmuch as the learned Judge did not hold that on the basis of the recorded reasons produced by the respondents, a responsible belief under section 147(a) could be formed and conditions for the formation of the requisite belief existed and were satisfied, the Court of the first instance should have held that the impugned notice was without jurisdiction and was illegal.

He has also contended that excepting producing the recorded reasons the respondents did not satisfy the Court that the conditions laid down in section 151(2) of the Act regarding the approval of the Commissioner had been satisfied. Dr. Pal has relied on several decisions in support of his contentions to which we shall presently refer.

On the other hand, the contentions of the learned Advocate for the Revenue is that the learned Judge came to a correct finding on the basis of the material in possession of the Assessing Officer. It has not been seriously disputed that the inspection of the records which were considered by the learned Judge was not given to the learned Advocate for the appellant.

We have considered the rival contentions. Notice under section 148 is not a show-cause notice. Such a notice can be issued only if the conditions precedent for assumption of jurisdiction under section 147(a) are satisfied. For invocation of jurisdiction under section 147(a), two conditions are to be satisfied; firstly, the ITO has reasons to believe that income, profits or gains chargeable to income-tax have escaped assessment, and secondly, he must have also reasons to believe that such escapement has occurred by reasons of either (i) omission or failure on the part of the assessee to make a return of his income under section 139 or (ii) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both the conditions are conditions precedent to be cumulatively satisfied before the ITO could assume jurisdiction to issue notice under section 148, read with section 147(a). Thus, if either of these two conditions is not fulfilled, the notice issued by the Assessing Officer would be without jurisdiction. In our view, therefore, the

learned Judge was not right in equating the notice under section 148 with a mere show-cause notice.

When the validity of a notice issued under section 148 is in challenge, it is for the ITO to satisfy the Court that the aforesaid conditions have been satisfied. The expression, 'reason to believe' means that there is a reason coupled with the belief. It is, therefore, open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing on the formation of belief and are not extraneous or irrelevant to the purpose of section 147(a). The Supreme Court in *Ganga Saran & Sons (P) Ltd. vs. ITO* (1981) 130 ITR 1 has reiterated the principle that if there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the ITO could not have reason to believe. In such a case, the notice issued by him would be liable to be struct down as invalid and without jurisdiction. The materials having a natural nexus to the formation of belief has to be disclosed by the ITO.

He can do so by filing an affidavit. The mere disclosure of the belief in the affidavit filed by the Income-tax Officer without setting out any material on the basis of which the belief was arrived at is not sufficient. Where no affidavit is filed by the ITO, in spite of the opportunity given, the Court may direct production of the records containing materials to establish that there is a direct nexus or live link between the materials and the formation of his belief. If the Court allows the ITO to produce such records and the Court examines the materials to find whether there are tenable reasons, the Court must allow inspection of such records to the assessee. The recorded reasons or materials or the letter of proposal sent by the ITO to the Commissioner are not privileged documents. In our view, the learned Judge was not right in denying the inspection of the records to the assessee. No litigant should have a feeling that the procedure adopted by the Court has denied him a reasonable opportunity of hearing. Unless a document is privileged, if Court looks into such document for the purpose of deciding the merits of the respective contentions, inspection of such document cannot be withheld from the adversary.

Let us now examine the merits of the contentions raised as to whether the ITO had jurisdiction to initiate the proceedings under section 147(a). As indicated earlier, no affidavit-in- opposition was filed by the ITO and, accordingly, no materials were disclosed. However, anaffidavit-in-opposition to the stay application has been filed by the ITO, Ward 4(1) in the Appeal Court. In the said affidavit-in-opposition in paragraph 5, the reasons recorded by the ITO have been disclosed which are as follows:

> "On a plot of land at 51/E, Garlahat Rd. the assessee constructed a house during the financial years 1966-67 to 1968-69. The assessee

has disclosed the cost of construction at Rs. 1,46,363. The Valuation Officer, Income-tax Department, has determined the cost of construction at Rs. 2,84,000. Thus, there is a gap of Rs. 1,37,637. This sum of Rs. 1,37,637 represented concealed income of the assessee. The cost of construction disclosed by the assessee for the previous year relevant to the assessment year 1967-68 is Rs. 24,100. Thus, the undisclosed income relating to the assessment year 1967-68 is Rupees

$$\frac{21400 \times 137637}{146363} = \text{or Rs. } 22,664$$

I have reasons to believe that the income of Rs. 22,664 has escaped assessment for the assessment year 1967-68 owing to the failure of the assessee to disclose fully and truly all the material facts necessary for her assessment. This income is sought to be assessed by taking action under section 147(a)."

The only question is, therefore, whether on the basis of the materials so disclosed can it be said that the ITO could have any reason to believe that by reason of any omission or failure on the part of the assessee to disclose any basic and primary fact relating to her assessment, any income chargeable to tax had escapeed assessment. It appears from the records that the Tribunal for the assessment year 1969-70 of the appellant/writ petitioner considered the question of the cost of construction of the house property in question. There the department preferred an appeal before the Tribunal against the order of the AAC deleting the addition of Rs. 48,162 made by the ITO as unexplained investment in the construction of house property. It appears from the order of the Tribunal that the assessee started construction c two storied building in July 1968 and it was completed in October 1968. The cost of construction was shown by the assessee at Rs. 1,46,363. Before the ITO, the books of account maintained for the construction and the other details supported by voucher, were produced. A valuer's certificate was also filed who valued the property including the outhouses which were already existing at Rs. 1,94,545. The Tribunal held as follows:

"The assessee has maintained books of account for the construction of the house property supported by bills and vouchers. The Income-tax Officer has not pointed out any defects in the maintenance c accounts, or in the bills produced. In the assessee's valuer's report the valuation of the outhouses amounting to Rs. 11,544 has been included which cannot be taken into consideration for the purpose of cost c construction of the new building. Apart from that the valuer has valued the property in the month of November 1968. This would not indicate the correct valuation as the construction started in 1966. Hence, the valuer's report does not reflect the correct valuation. Since the assessee maintained books of account with full details supported by voucher the Income-tax Officer cannot reject the same without pointing out an

defects. In the circumstances, the Appellate Assistant Commissioner was perfectly justified in accepting the valuation shown by the assessee. We do not find any error in the order of the Appellate Assistant Commissioner. Accordingly, we uphold the order of the Appellate Assistant Commissioner".

The departmental reference application against the said appellate order of the Tribunal was rejected by the Tribunal. The said findings of the Tribunal have become final and are binding on the respondents. The said decision of the Tribunal was arrived at prior to the issue of the impugned notice under section 148 on 31-3-1976. In the face of the aforesaid findings and the order of the Tribunal, the ITO cannot have any basis to assure that the cost of construction was anything more than Rs. 1,46,363 and he could not have any reasons to believe that there was any omission or failure on the part of the petitioner to disclose fully or truly any matrial facts necessary for the assessment. The valuation made by the departmental valuer could not be any lawful or relevant material on the basis whereof the respondent ITO could have any reasons to believe or could bona fide and lawfully believe that any income as regards the construction of the said house property had escaped assessment as alleged. The respondent ITO could not form the requisite belief under section 147(a) and had no jurisdiction whatsoever to issue the impugned notice and the purported proceedings under section 148 is wholly without jurisdiction and authority of law.

In Smt. *Tarawati Debi Agarwal v. ITO* (1986) 162 ITR 606 this Court held, *inter alia,* that where yearwise construction cost was reflected in the balance sheet, which was not disputed by the respondents, absence of details of expenses could not be a ground for reopening the assessment under section 147(a) charging the assessee with commission or failure to disclose fully and truly all material facts. There cannot be a ground for reopening the assessment holding that the assessee did not disclose the cost of construction or that the difference between the cost of construction shown by the assessee and subsequently estimated by the departmental valuer represents undisclosed investment. This is not a case where a proceeding can be initiated under section 147(a). The ITO in assuming jurisdiction did not have any *prima facie* ground for thinking that there had been any non-disclosure of material facts. In any event valuation is always a question of opinion and unless there is a clear finding on the basis of the materials that the assessee invested in the construction of the house property more than what had been shown by her in course of the assessment proceeding, the ITO cannot proceed merely on the basis of the valuation report of the departmental valuer.

Similar view has been taken by this Court in *Rasiklal Jivanlal Shah vs. ITO* (1982) 133 ITR 476.

For the reasons aforesaid, this appeal is allowed. The judgment and order

under appeal is set aside. Rule is made absolute. Let appropriate writs be issued. The impugned notice and all proceedings are quashed.

There will be no order as to costs.

Sen, J. — I agree.

Appeal allowed.

(1995) 126 Taxation 461 (Cal.)

IN THE HIGH COURT OF CALCUTTA

(Before Hon'ble Mr. Justice Ajit. K. Sengupta & Hon'ble Mr. Justice J.N. Hore)

IT Reference No.102 of 1982

Commissioner of Income-tax

vs.

Hayward Waldia Refinery Ltd.

For the Appellant	:	**S.K. Mitra & R.C. Prasad**
For the Respondent	:	**R.N. Dutt**
Decided on	:	6-7-1992

BUSINESS EXPENDITURE — Legal charges paid by assessee for obtaining advice of Solicitor regarding dilution of shareholdings to give effect to provisions of FERA — Claiming expenditure as revenue expenditure — Further expenditure incurred on presentation of wrist watches to selected employees — Also claiming the same as business expenditure — Assessee incurring expenditure in connection with proceedings under the Act — ITO disallowing payment in excess of Rs. 5,000/- in view of provisions of section 80VV — Held, expenditure regarding dilution of shareholdings a capital expenditure — Expenditure incurred in connection with the presents on wrist watches wholly and exclusively laid out for the purpose of business, hence allowable — Expenditure not connected with advice in respect of specified proceedings under the Act but general in nature — Provisions of section 80VV not applicable, hence allowable.

Income-tax Act, 1961 — Sections 37(1) and 80VV.

FACTS

The first question relates to the assessee's claim for Rs. 12,000/- paid for obtaining the advice of the solicitors regarding dilution of its shareholding in conformity with the provisions of the Foreign Exchange Regulation Act, 1973. Both the ITO and the AAC rejected the claim. The Tribunal, however, allowed the claim as a revenue expenditure deductible u/s 37. The second dispute relates to the assessee's claim

for Rs. 24,000/- paid to Shri V.S.K. Nadar for professional services rendered by him. The ITO disallowd the same on the ground that Shri Nadar was a tax consultant of the company and, therefore, the payment fell within the provisions of section 80VV of the Income-tax Act. He, therefore, allowed a sum of Rs. 5,000/- only under the relevant provisions of law. The last dispute relates to the assessee's claim for Rs. 15,814 on account of the price of wrist watches presented to its employees. The ITO and the CIT (A) confirmed the disallowance on the ground that the expenditure for presentation of wrist watches by way of gift to selected employees of the assessee could not be regarded to have been incurred for the welfare of the employees and for the purpose of its own business.

DECISION

The Hon'ble Court held that following the decision of this Court in *Avery India Ltd. vs. CIT* (1993) 199 ITR 745, it was held that the expenditure, irrespective of the requirement under the provisions of the Foreign Exchange Regulation, Act, is for augmentation of the capital base of the company and is therefore, an expenditure of capital nature not allowable as deduction u/s 37. The first question was, therefore, answered in the negative and in favour of the revenue. As regards second question, the Tribunal has found as a fact that the remuneration in excess of Rs.5,000/- paid to Shri Nadar is not for any services rendered by him of the nature referred to in section 80VV and the remuneration was paid by the assessee to Mr. Nadar in his capacity as a tax consultant or adviser for giving general advice in relation to taxation matters. This finding has gone unchallenged. Therefore, the second question was answered in the affirmative and in favour of the assessee. The third question is the finding of fact that the presentation of wrist watches was in the nature of an incentive to encourage the employees to attend to work punctually and was incurred also to keep the employees happy and to earn their goodwill towards the company as the employer, is not in dispute. In the face of the facts as found by the Tribunal, the contention of the revenue was not accepted that the expenditure on account of such presentation to the employees was not expenditure wholly and exclusively laid out for the purpose of its business.

Case referred to :

Avery India Ltd. vs. CIT (1993) 199 ITR 745 (Cal)

Full text of the Judgment is given below :

JUDGMENT

(A.K. Sengupta, J.)

In this reference under section 256(1) of the Income-tax Act, 1961 for the assessment year 1977-78, the following questions of law have been referred to this Court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in law in holding that the legal charges of Rs.12,000 paid by the assessee for obtaining the advice of the solicitors regarding dilution of its shareholding in pursuance of the provisions of the Foreign Exchange Regulation Act, 1973, is a revenue expenditure under section 37 of the Income-tax Act, 1961?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that the remuneration of Rs.24,000 paid to one of its directors, Shri V.S.K. Nadar, by the assessee, does not attract the provisions of section 80VV, read with section 37(1), of the Income-tax Act, 1961?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the expenditure of Rs.15,814 as presentation of wrist watches to employees was a revenue expenditure incurred wholly and exclusively for the purpose of the assessee's business?

The first question relates to the assessee's claim for Rs.12,000 paid for obtaining the advice of the solicitors regarding dilution of its shareholding in conformity with the provisions of the Foreign Exchange Regulation Act, 1973. Both the ITO and the AAC rejected the claim. The Tribunal, however, allowed the claim as a revenue expenditure deductible under section 37.

Following the decision of this Court in *Avery India Ltd. vs. CIT* (1993) 199 ITR 745, where the judgment was delivered on 18.7.1991, we hold that the expenditure, irrespective of the requirement under the provisions of the Foreign Exchange Regulation Act, is for augmentation of the capital base of the company and is, therefore, an expenditure of capital nature not allowable as deduction under section 37. We, therefore, answer the first question in the negative and in favour of the revenue.

The second dispute relates to the assessee's claim for Rs.24,000 paid to Shri V.S.K. Nadar for professional services rendered by him. The ITO disallowed the same on the ground that Shri Nadar was a tax consultant of the company and, therefore, the payment fell within the provisions of section 80VV of the Income-tax Act. He, therefore, allowed a sum of Rs. 5,000 only under the relevant provisions of law.

The assessee went in appeal to the Commissioner of Income-tax (Appeals) and argued that, in terms of the resolution passed at the annual general meeting of the company, Shri Nadar was held entitled to receive remuneration of Rs.2,000 per month and the provisions of section 80VV were not attracted. The Commissioner (Appeals) was of the view that Shri Nadar was a retired income-tax official and his services could have been more pertinent to income-tax representation than other fields of law. He, therefore, restricted the disallowance to Rs. 4,000 only.

On a second appeal before the Tribunal, the entire claim was allowed in full by the Tribunal with the following observations:

> "We have considered the rival submissions and the facts and circumstances of the case. We are of the view that the remuneration paid by the company to Shri Nadar does not fall within the purview of section 80VV of the Act. The said section restricts deduction in respect of expenses incurred by an assessee in respect of any proceedings before any income-tax authority or the Appellate Tribunal or any court relating to the determination of any liability under the Income-tax Act by way of tax, penalty or interest. In other words, section 80VV seeks to restrict the allowance in respect of expenditure incurred by an assessee in respect of a specific proceeding under the Income-tax Act. Therefore, the said section has no application in relation to remuneration or fees paid by an assessee to a tax consultant or other adviser for giving general advice in relation to taxation matters. We also see no justification in the order of the Commissioner of Income-tax (Appeals) restricting the allowance to Rs.4,000 only. He has not given any valid reason in support of the view that Shri Nadar's services would have been pertinent to only income-tax representation. He has also not given any reason for holding that the value of Shri Nadar's services to the company even in relation to income-tax consultations would be only Rs.4,000 per annum. We, therefore, see no merit in the disallowance and direct that the entire remuneration paid to Shri Nadar should be allowed as deduction in computing the taxable profits of the company. However, as a corollary to our direction, the separate deduction of Rs.5,000 allowed by the Income-tax Officer under section 80VV of the Act shall stand withdrawn".

The revenue, in this question, has not assailed the finding of fact by the Tribunal. The Tribunal has found as a fact that the remuneration in excess of Rs. 5,000 paid to Shri Nadar is not for any services rendered by him of the nature referred to in section 80VV and the remuneration was paid by the assessee to Mr. Nadar in his capacity as a tax consultant or adviser for giving general advice in relation to taxation matters. This finding has gone unchallenged. Therefore, we cannot but answer the second question in the affirmative and in favour of the assessee.

The last dispute relates to the assessee's claim for Rs.15,814 on account of the price of wrist watches presented to its employees. The ITO and the Commissioner of (Appeals) confirmed the disallowance on the ground that the expenditure for presentation of wrist watches by way of gift to selected employees of the assessee could not be regarded to have been incurred for the welfare of the employees and for the purpose of its own business.

On second appeal before the Tribunal, the claim was allowed with the following observations :

"We have considered the rival submissions and the facts on record. We find that the assessee's contention before the Commissioner of Income-tax (Appeals) was that it had presented the wrist watches to its 67 employees with a view to encouraging their timely attendance at work. Apart from this factor, it cannot be denied that the presentation of wrist watches would have helped the company in keeping good relations with its employees, keeping the employees satisfied and also earning their goodwil' towards the company. A complete list of the employees to whom the wrist watches have been presented had also been filed by the assessee-company with the income-tax authorities. We, therefore, see no reason for the disallowance of the expenditure incurred by the assessee on the presentation of the wrist watches which must be regarded as an expenditure wholly and exclusively incurred by the company for the purpose of its business. The addition of Rs. 15,994 is, therefore, deleted."

Here also, the finding of fact that the presentation of wrist watches was in the nature of an incentive to encourage the employees to attend to work punctually and was incurred also to keep the employees happy and to earn their goodwill towards the company as the employer, is not in dispute. In the face of the facts as found by the Tribunal, we cannot accept the contention of the revenue that the expenditure on account of such presentation to the employees was not expenditure wholly and exclusively laid out for the purpose of its business. The ITO, in the assessment order, has not either made out a case that there was extra-commercial consideration in presenting the watches to the employees.

We, therefore, answer the third question in the negative (sic) and in favour of the assessee.

There will be no order as to costs.

J.N. Hore, J. — I agree.

Summary of High Court Cases

(1995) 126 Taxation 466 (Bom.)

IN THE HIGH COURT OF BOMBAY

(Before Hon'ble Mrs. Justice Sujata Manohar &

Hon'ble Mr. Justice S.H. Kapadia)

IT Application No. 193 of 1992

Commissioner of Income-tax

vs.

Jain Bros.

For the Appellant	:	**A.S. Khan**
For the Respondent	:	**P.S. Jetley**
Decided on	:	28.4.1993

REFERENCE TO HIGH COURT — Firm consisting of 5 partners — Three partners retiring — Remaining two partners constituting new firm — Two retiring partners forming a new partnership and taking a third person as partner — Each of these firm taking over some of the business of old firm — Assessce claiming no transfer of investment allowance and development rebate of the old firm — Tribunal holding there being no dissolution of old firm, investment allowance could not be withdrawn — Revenue seeking reference — Reference application rejected — Held, in view of Supreme Court judgment in the case of *Malabar Fisheries Co. vs. CIT* (1979) 120 ITR 49, no referable question of law arose.

Income-tax Act, 1961 — Section 256(2).

FACTS & DECISION

The firm of Jain Bros., Jalgaon, originally consisted of five partners. From 1.1.1985, three partners retired from the firm. The remaining two partners constituted a new partnership. Two of the retiring partners took a third partner and formed a new partnership. Each of these firms and the remaining sole retiring partner took over some of the businesses of the old partnership. The present assessees are the new firm in which two of the partners of the old firm continue to be partners of the new firm. In these circumstances, the ratio laid down by the Supreme Court in the case of Malabar Fisheries Co. vs. CIT (1979) 120 ITR 49 covers the points in dispute in the present case and, hence, no useful purpose will be serve by directing the Tribunal to refer the above question to us.

TRIBUNAL DECISIONS

(1995) 126 Taxation 1 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH 'B'
(Before Shri B.M. Kothari and Shri Phool Singh)
ITA No. 1574/Ahd/90
(Assessment Year 1985-86)

Bombay Steel Centre
vs.
Income-tax Officer

For the Appellant	:	**M.K. Patel**
For the Respondent	:	**M.S. Rai**
Decided on	:	21-10-1994

ADDITION — Assessee declaring GP rate of 16% on sales Rs. 7,70,983 against 15.36% on sales Rs. 6,39,320 in preceding year — In absence of day to day stock register Assessing Officer applying GP rate of 21% on sales declared — Held, GP a balancing figure and unless specific inaccuracy or incompleteness of accounting with specific instances pointed out GP cannot be disturbed — Trading addition made directed to be deleted.

Income-tax Act, 1961 — Section 145.

FACTS

The assessee filed appeal against the addition of Rs. 1,04,262/- being cash credit in the account of one of the partners. This ground was, however, withdrawn. The other ground of appeal was in regard to the trading addition. The assessee declared GP rate of 16% on sales of Rs. 7,70,983/- as against GP rate of 15.36% declared and accepted on sales of Rs. 6,39,320/- in the preceding year. The Assessing Officer applied the GP of 21% as the assessee was not maintaining day to day stock register and he thus made an addition of Rs. 38,549/- to the declared trading results. This addition was confirmed by the CIT(A) and the assessee filed a second appeal.

DECISION

The Hon'ble Tribunal observed that it was true that the absence of day to day stock register could enable the Assessing Officer to invoke the provisions of section 145(1) technically. But in this case the purchases were supported by vouchers and their correctness not challenged. The declared figure of sale had been accepted by the Assessing Officer while applying the higher GP. The GP was the balancing figure and unless any specific

item appearing in the trading account was disturbed and/or a specific finding about the incompleteness of accounts or inaccuracy in the method of accounting was given duly supported by specific instances the correctness of declared GP could not validly be disturbed particularly when it was slightly higher than the results in the immediately preceding year. The addition made by the Assessing Officer was thus directed to be deleted.

Full text of the Order is given below :

ORDER

(B.M. Kothari, A.M.)

In this appeal, the assessee has raised as many as six grounds but there are only two effective grounds. The first effective grievance of the assessee relates to addition of Rs. 38,549 made in the declared trading results. The second ground relates to confirmation of addition of a sum of Rs. 1,04,262 being the cash credit in the account of one of the partners of the firm viz. Shri Kamlesh Manilal Shah, in the hands of the firm. Shri Mehul Patel, the learned counsel for the assessee submitted that under instructions from his client he would not like to press the point relating to addition of Rs. 1,04,262 treated as unexplained cash credit. Hence the ground relating to addition of Rs. 1,04,262 is rejected as not pressed.

The only ground which remains to be considered is in respect of addition of Rs. 38,549/-. The learned counsel submitted that the G.P. rate shown by the assessee in the year under consideration was 16% on sales of Rs. 7,70,983 as against G.P. rate of 15.36% declared by the assessee and accepted on sale of Rs.6,39,320 in the immediately preceding year. He submitted that the Assessing Officer has erred in applying the G.P. rate of 21% based on the G.P. rate declared by the two associate concerns M/s Bajaj Steel Centre and M/s Manilal & Sons. He submitted that the facts relating to those two cases are different as they are dealing in larger variety of items as compared to the assessee. The turnover of those firms cannot be considered as comparable as their turnover is fairly large and they have advantage of economies in expenditure. He also invited our attention towards the elaborate submissions made before the CIT(A). A copy there was paced on record. He also pointed but that in subsequent years the assessee earned G.P. rate of 19.99% and 19% in A.Ys. 1986-87 and 1987-88 and had voluntarily shown increased G.P. rate in the aforesaid subsequent years. The learned counsel thus submitted that whenever the assessee earned better G.P. it disclosed better G.P rate and whenever they earned lower G.P. they naturally declared lower G.P. rate. The G.P rate can never remain constant in all the years. He was fair enough to state that the only defect is that the assessee has not maintained day to day stock records but the declared results are supported by regular books of account and vouchers and entries of stocks are made on the basis of inventory prepared by physical verification at the close of each year. He urged that

the addition made in the declared trading results should be cancelled.

The learned Sr. D.R. submitted that the stock inventory was not produced before the A.O. The accounts suffer from the defects pointed out in the assessment order. The CIT(A) has rightly confirmed the addition. He relied on the elaborate reasons mentioned in the assessment order.

We have carefully considered the rival submissions made by the learned representatives and have also gone through the facts stated in the orders of the departmental authorities, the facts elaborately mentioned in the written submissions filed before the CIT(A) and the charts produced by the learned counsel in the compilation. It is true that absence of day to day stock register may enable the Assessing Officer to invoke the proviso to sec. 145(1) and a resort to estimation of profit may be technically justified. However, the G.P. has to be determined in a just and fair manner. The A.O. has applied G.P. rate of 21% on declared sales of Rs. 7,70,983. He has also not given any definite finding as to which item appearing in the trading account is not acceptable and to what extent the particular item appearing in the trading account will be subject to variation. The opening stock and closing stock accounted for in the books of account has not been disturbed by the Assessing Officer and any variation in the figure of closing stock would have resulted in grant of consequent relief in the subsequent year. The purchases are supported by vouchers and correctness thereof has not been challenged. The declared figure of sale has been accepted by the Assessing Officer because he has himself applied the G.P. on the same amount of declared sale of Rs. 7,70,983. The G.P. is the balancing figure and unless any specific item appearing in the trading account is disturbed and/or a specific finding about the non-regularity or incompleteness of the books of account or inaccuracy in the method of accounting is given and such a finding is supported by few specific instances, the correctness of declared G.P. cannot validly be disturbed particularly when it is slightly higher than the results shown in the immediately preceding year. We, therefore, direct the Assessing Officer to delete the addition of Rs. 38,549 made in the trading results. The other addition of Rs. 1,04,262 is confirmed in view of the concession given by the assessee.

In the result, the appeal is partly allowed.

(1995) 126 Taxation 4 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH

(Before Shri J. Kathuria and Shri N.K. Agrawal)

ITA Nos. 345 & 346/Chandi/1994

(Financial Years : 1987-88 and 1989-90)

The Sr. Post Master

vs.

Dy. Commissioner of Income-tax

For the Appellant	:	**Sudhir Sehgal**
For the Respondent	:	**Hardeep Srivastava**
Decided on	:	13-12-1994

PENALTY — For the financial years 1987-88 and 1989-90 returns on Form No. 24 u/s 206 were due by 30-4-1988 & 30-4-1990 — Returns for financial year 1989-90 filed on 30-8-1990 and for financial year 1987-88 on 26-12-1990 — DCIT imposed penalties u/s 27A(2)(c) — TDS paid within time — Subsequent returns also filed within time — Held, before amendment of sec. 206 w.e.f. 27-9-1991 there was no time limit for delivery of such returns — Penalties imposed deleted.

Income-tax Act, 1961 — Sections 206 & 272A(2)(c).

Income-tax Rules, 1962 — Rule 37 & Form No. 24.

FACTS

Returns u/s 206 on Form No. 24 for financial years 1987-88 and 1989-90 were filed on 26-12-1990 and 30-8-1990 after the issue of show cause notices by the Assessing Officer. Tax was duly deducted at source and deposited in Govt. account within time. Subsequent returns were also filed by due dates. However since these returns were filed late the DCIT imposed penalty of Rs. 66,750/- for financial year 1987-88 and a penalty of Rs. 12,100 in regard to the return for the financial year 1989-90 u/s 272A(2)(c) of the Income-tax Act, 1961. These penalties were confirmed by the CIT(A). The assessee filed a second appeal.

DECISION

Following Tribunal decision in the case of *Ginners and Pressers Ltd. vs. DCIT* (1993) 47 ITJ (Bom.) 393, the Hon'ble Tribunal held that before the amendment of sec. 206 w.e.f. 27-9-1991, sec. 206 as it stood originally did not prescribe any time limit for preparation and delivery of return u/s 206. The reference in the section was only to the preparation of the return before a particular date. The returns for both the financial years were indisputably prepared by the assessee and submitted to the Director of Accounts (Postal) Jullundhar though the returns were not filed before the

ITO but were prepared before the due dates. There was no default regarding the deduction of tax at source or its payment on the Govt. account. The default, if any, was technical one. Subsequent returns were filed in time. Taking all these factors into account, the Hon'ble Tribunal deleted the penalties for both these years.

Case referred to :

Ginners & Pressers Ltd. vs. DCIT (1993) 47 ITJ (Bom.) 393

Full text of the Order is given below :

ORDER

(J. Kathuria, A.M.)

These two appeals by the assessee pertain to financial years 1987-88 and 1989-90 and are disposed of by a combined order for the sake of convenience.

Brief facts of these cases are these. For financial year 1987-88, the assessee was required as per Assessing Officer to file return u/s 206 of the Act on form No. 24 by 30-4-1988. Similarly, return for financial year 1989-90 was to be filed by 30-4-1990. The Assessing Officer issued general show-cause notices dated 23-8-1990 and 21-11-1990, copies of which are available at pages 6 and 7 of the assessee's compilation. The assessee actually filed the return for financial year 1989-90 on 30-8-1990 and for financial year 1987-88 on 26-12-1990.

The Assessing Officer imposed a penalty of Rs. 66,750/- for financial year 1987-88 and of Rs. 12,100/- for financial year 1989-90 u/s 272A(2)(c) of the Act. These penalties were confirmed by the learned CIT(A) vide his consolidated order dated 21-12-1993. The assessee has challenged the confirmation of these penalties.

Shri Sudhir Sehgal, the learned counsel for the assessee, submitted that tax deducted at source for financial year 1989-90 was Rs. 929/- which was duly deducted and deposited in Government account. Similarly, it was submitted that for financial year 1987-88, the tax deductible at source was Rs. 213/- which was duly deducted and paid. Inviting our attention to the provisions of section 206 as they stood at the relevant time, it was submitted that the statutory requirement of section 206 was that the assessee "shall prepare, within the prescribed time after the end of each financial year, and deliver or cause to be delivered the return u/s 206." It was pointed out that by the Finance (No.2) Act, 1991 there was an amendment of the said section w.e.f. 27-9-1991 and according to the amendment, the new requirement was that the assessee "shall within the prescribed time after the end of each financial year prepare and deliver or cause to be delivered the return u/s 206". It was submitted that for financial years 1987-88 and 1989-90, the statutory requirement was that the return u/s 206 had to be prepared and not necessarily delivered after the end of each financial

year. It was submitted that the amendment brought about w.e.f. 27-9-1991, however, statutorily required the assessee to prepare and deliver the return u/s 206 after the end of each financial year. According to the learned counsel for the assessee, the law at that time did not contemplate the filing of return u/s 206 before the Assessing Officer immediately after the close of the financial year and that this amendment came much later w.e.f. 27-9-1991. It was submitted that even if it were considered that earlier the provisions were ambiguous, the ambiguity should be interpreted in favour of the assessee and not against him.

The learned counsel for the assessee submitted that statement regarding the tax deducted at source was prepared in March, 1988 for financial year 1987-88 and the same was forwarded to the office of the Director of Accounts (Postal), Jalandhar. This was sent by registered post to the aforesaid authority on 2nd April, 1988 as per voucher list No. 566 copy of which is placed on record. Similarly, it was submitted that for financial year 1989-90, the information was submitted to the aforesaid authority vide voucher list No. 123 dated 4-9-1990, a copy of which also has been placed on record. It was submitted that if at all, there was only a technical default for which the assessee should not have been penalised. It was also submitted that for financial years 1991-92, 1992-93 and 1993-94, the assessee had duly filed the returns on form No. 24 before the concerned authority on 16-4-1991, 18-4-1992 and 21-4-1993 respectively.

The learned counsel for the assessee also placed reliance on the Tribunal's decision in the case of *Ginners & Pressers Ltd. vs. DCIT* (1993) 47 ITJ (Bom.) 393. In that case, the provisions of section 206 were interpreted and the effect of the amendment brought about in the said section w.e.f. 27-9-1991 was also examined. In that case, the Tribunal held that section 206 as it originally stood neither prescribed any time limit nor authorised the rule making authority to do so. The Tribunal further held that the limitation prescribed in rule 37 of the Income-tax Rules was, therefore, *ultra vires* and had to be ignored. It was also held by the Tribunal that the amendment brought about w.e.f. 27-9-1991 could not be given retrospective effect so as to apply to the returns for the earlier financial years. It was submitted that looked at, from any angl, there was no justification for levying/ confirming the penalties aforesaid.

The learned D.R. relied on the orders of the authorities below.

We have carefully considered the submissions of both the parties as also the material on record. As held by the Bombay Bench of the Tribunal in the case of *Ginners & Pressers* (supra) section 206 as it stood originally did not prescribe any time limit for preparation and delivery of the return u/s 206. The reference in the section was only to the preparation of the return before a particular date. The returns for financial years 1987-88 and 1989-90 have indisputably been prepared by the assessee before the

due dates. The evidence produced by the assessee clearly proves that these returns were, however, not filed before the Income-tax authorities in time because the Sr. Post Master perhaps thought that his job was over when he submitted the particulars to the Director of Accounts (Postal), Jalandhar. There is no default regarding the deduction of tax at source or its payment on the Government account. The only default, if any, is a mere technical default of not filing the returns u/s 206 before the concerned income-tax authorities. As soon as the show-cause notice was received by the assessee, the returns on form No. 24 were also duly filed before the income-tax authorities. For the financial years 1991-92, 1992-93 and 1993-94, there is absolutely no default and the returns have been filed much before the close of the month of April immediately succeeding the financial year. Taking all these factors into consideration, we delete the penalties aforesaid.

In the result, both the appeals are allowed.

(1995) 126 Taxation 7 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD BENCH 'A'

(Before Shri B.M. Kothari and Shri Phool Singh)

ITA Nos. 367, 372 to 375/Ahd/1990

(Asstt. Years 1978-79 to 1982-83)

Income-tax Officer

vs.

M/s Patel Manufacturers

For the Appellant	:	**A.K. Hajela**
For the Respondent	:	**M.K. Patel**
Decided on	:	21-10-1994

INVESTMENT ALLOWANCE — For asst. yrs. 1978-79 to 1981-82 ITO withdrew investment allowance u/s 155 (4A) — He noticed that firm dissolved on 30-6-1981 and taken over by a Ltd. Co. — Could not have utilized the investment allowance reserve for 10 years — Also identity of assessee changed — In asst. year 1982-83 ITO disallowed assessee's claim for investment allowance for similar reasons — Held, Reserve created in each year utilized in subsequent year in purchasing machinery — Ltd. Co. was a partner in firm — Taking over going concern by a partner not amounted to transfer — Assessee entitled to investment allowance — Appeals dismissed.

Income-tax Act, 1961 — Sections 32A(5) & 155(4A).

FACTS

The assessee firm for the Asst. Years 1978-79 to 1981-82 was duly

granted the investment allowance. During 1982-83 proceedings ITO did not allow the said allowance as he noticed that the firm had been dissolved on 30-6-1981 and since 1-7-1981 a Ltd. Co., who was a partner in assessee firm, took over assets etc of the dissolved partnership concern. The ITO further observed that the firm having dissolved, the investment allowance reserve could not be utilized or remain in business for 10 years as the firm dissolved before the expiry of the said period. He thus withdrew the investment allowance allowed in Assessment Years 1978-79 to 1981-82 u/s 155 (4A) read with section 32A(5) of the Income-tax Act and disallowed the claim of assessee in Assessment Year 1982-83. The CIT(A) allowed the appeal of the assessee. The revenue filed second appeals.

DECISION

The Hon'ble Tribunal observed that the assessee had already utilized the Investment Allowance reserves in each succeeding year and purchased the new machinery and the conclusion of the ITO that the assessee could not have utilized the reserve for 10 years was not correct. Apart from that the assessee firm having dissolved and all assets and liabilities having been transferred to partners and one of the partners having taken over the said business as going concern would not be termed as transfer as contemplated in Section 155 read with section 32A(5) of the Act. In view of this the orders of CIT(A) were confirmed for all these years and appeals filed by the revenue dismissed.

Cases referred to :

1. *CIT vs. S. Balasubramaniam* 138 ITR 815
2. *Malabar Fisheries Co. vs. CIT Kerala* 120 ITR 49 (SC)
3. *ITO vs. Pratik Prints* (1991) 37 ITD 159
4. *South India Steel Rolling Mills vs. CIT* 135 ITR 322 (Mad.)

Full text of the Order is given below :-

ORDER

(Phool Singh, J.M.)

As these appeals involve common issue, these were heard together and are being disposed off by this common order for the sake of convenience.

The grounds of appeal raised by the revenue in these appeals read as under:-

Assessment Years 1978-79 to 1981-82

1. The learned CIT(A) erred in law and on facts in holding that ITO was not justified in withdrawing the investment allowance which was granted during original assessment proceedings.
2. The learned CIT(A) erred in law and on facts in cancelling the order under sec. 155(4A) read with sec. 32A(5).

Assessment Year 1982-83

1. The learned CIT(A) erred in law and on facts in directing to give the investment allowance as claimed by the assessee.

Relevant facts for disposal of these appeals are that in A.Y. 1978-79 the ITO completed assessment in the case of assessee on 17-3-1982 determining total income at Rs. 24,62,630/-. During the course of assessment proceedings the assessee claimed investment allowance of Rs. 25,017/- being 25% of actual cost of machinery of Rs. 1,00,070/-. On a scrutiny of the assessee's file by the ITO it was observed that the assessee created investment allowance reserve at 75% of the investment allowance admissible to the assessee. But the partnership of the assessee firm stood dissolved vide dissolution deed dt. 30-6-1981 and since 1-7-1981 a Limited Company in the name of P.M. Diesels (P) Ltd. took over the assets of the dissolved partnership concern. The A.O. further observed that the investment allowance reserve at 75% of the investment allowance so allowed to the assessee could not remain in the business for the period of 10 years as the assessee firm stood dissolved prior to expiry of that period. Accordingly he was of the opinion that investment allowance so allowed to the assessee should be withdrawn and accordingly he issued a show cause notice dt. 19-1-1985 for the purpose of withdrawal of investment allowance under the provisions of section 155(4A) of Income-tax Act, 1961 (hereinafter referred to as the Act) read with section 32A(5) of the Act for withdrawal of the amount of investment allowance of Rs. 25,017/- granted to assessee in A.Y. 1978-79. The assessee made written submission on 2-2-1985 and alleged that ITO was beyond his jurisdiction over the controversy since the reserves so created have been utilised for the purpose of acquiring new machineries during the subsequent years. The ITO was not satisfied with the contention of the assessee on the ground that reserves so created remained in existence for the purpose of business of the undertaking for a period of 10 years running immediately following installation of the machinery. He also placed reliance on the decision of Madras High Court in the case of *South India Steel Rolling Mills vs. CIT, Madras* 135 ITR 322 and passed the order withdrawing the investment allowance originally granted under section 32A(5) of the Act for A.Y. 1978-79. Separate orders for A.Ys. 1979-80, 1980-81 and 1981-82 were also made in the same manner withdrawing the investment allowance granted to the assessee and for A.Y. 1982-83 the claim of the assessee for investment allowance was rejected on the ground that assessee firm stood dissolved vide dissolution dt. 30-6-1981, the previous year relating to A.Y. under consideration and question of granting investment allowance during the A.Y. does not arise since the conditions laid down under sec. 32(A)(a) of the Act are not satisfied because the investment allowance reserves were not utilised by the assessee for the purpose of business of the undertaking before the expiry of 10 years, nor the said reserves shall be available to it. The assessee preferred separate

appeals against the withdrawal of investment allowance directed by ITO relating to A.Ys. 1978-79 to 1981-82 and against the rejection of the claim of the investment allowance of the assessee relating to A.Y. 1982-83 and the CIT(A)-II, Rajkot vide consolidated order dt. 28-11-1989 decided the appeals of the assessee in its favour and observed that the ITO was not justified in withdrawing the investment allowance which was granted during the original assessment proceeding and thus cancelled the order under Section 155 (4A) read with Section 32A(5) of the Act passed by ITO relating to A.Ys. 1978-79 to 1981-82 and further directed the ITO to allow the claim of the assessee regarding investment allowance as claimed by assessee in A.Y. 1982-83. The revenue feeling aggrieved from the order of the CIT(A) Rajkot have filed these five appeals and we have heard the learned D.R. at length and also the learned counsel for assessee and perused the material placed before us.

So far as the contention of the learned D.R. is concerned, he has heavily placed reliance on the order and reasons given in the order of ITO while withdrawing the investment allowance granted to the assessee in the assessment years 1978-79 to 1982-83. It was also submitted by the learned D.R. that once the very existence of firm was not for 10 years as it stood dissolved on 30-6-1981, the assessee firm was not in a position to utilise the reserves of investment allowance which was to remain in existence for a period of ten years and ITO was justified in withdrawing the investment allowance and in rejecting the claim of the assessee for the year 1982-83. As against this, the learned counsel for assessee has placed reliance on the submissions made before the CIT(A) which do find place in detail in para-3 to para-10 of the order of CIT(A) and asserted that the amount of investment allowance reserves was utilised by the assessee in succeeding years and the fact of dissolution of the firm was not going to change the very position and the ITO was not justified to conclude that there is any breach of provisions of any section necessitating the withdrawal of the investment allowance.

In this case undisputed facts are that the assessee was granted investment allowance under sec. 32A(5) of the Act as per the details appearing in para 3.1 of the order of CIT(A) (p. 4):-

A.Y.	Cost of new machinery	Reserves created	Allowance granted
1978-79	1,05,150	19,715	25,017
1979-80	2,48,472	53,113	70,817
1980-81	2,02,562	37,980	50,640
1981-82	2,87,322	53,873	71,830

The assessee asserted to have purchased new machineries in each of the assessment year out of capital including the amount of investment allowance

reserves. The details of utilisation of investment allowance reserves in purchase of machineries are given in para 3.2 of the order of CIT(A) which are as under :-

A.Y.	I.A. granted	A.Y. in which utilised	Amount utilised for purchase of new machinery
1978-79	25,017	1979-80	2,48,472
1979-80	70,817	1980-81	2,02,562
1980-81	50,640	1981-82	2,87,322
1981-82	71,830	1982-83	1,44,750

The case of the assessee is that cost of new machinery far exceeded the reserve available and the balance of reserve of investment allowance became NIL on account of purchase of new machineries and therefore, the question of retaining the investment allowance reserves for ten years did not arise. This plea of the assessee has not been disputed by the ITO on fact and once the new machineries have been purchased in each succeeding year and the cost of new machinery is quite excessive to the amount of investment allowance reserves then the very provisions of section 32A(5) of the Act are fully complied with as it requires that investment allowance reserve is to be utilised for the purpose of requiring a new machinery for the purpose of business before the end of 10 years. This plea was rightly relied by the CIT(A). There was no justification for ITO to withdraw the investment allowance for asst. years 1978-79 to 1981-82.

The fact which was made basis for withdrawing the investment allowance by the ITO in passing the order under section 155(4A) read with section 32A(5) of the Act was the fact of the dissolution of the firm on 30-6-1981. It is undisputed fact that assets of the assessee firm were taken over by P.M. Diesel Pvt. Ltd. a company which was already a partner in the assessee firm. According to the learned ITO the dissolution of the firm made it impossible for assessee firm to utilise the investment allowance reserves and thus the assessee was not entitled for investment allowance. As already discussed above, the assessee has already utilised the investment allowance reserves in each succeeding year and purchased new machinery and this conclusion of the ITO was not factually correct. Apart from it the very fact that the assessee firm was dissolved and all assets and liabilities were transferred to partners and one of the partners took over the same business as going concern will not be termed as transfer of assets as contemplated in Section 155 read with section 32A(5) as laid down by the Hon'ble Supreme Court in the case of *Malabar Fisheries Co. vs. CIT, Kerala* 120 ITR 49 (SC). ITAT Ahmedabad Bench 'A' in the case of *ITO vs. Pratik Prints* (1991) 37 ITD 159 has dealt with the same issue in which the assessee firm was dissolved on 31-3-1978 and a deed of dissolution of partnership

was executed on 19-9-1978. Upon dissolution, all the assets and liabilities of the assessee were taken over by one of the partners, who continued the business and ITO invoked the provisions of Section 155(4A) read with section 32A(4)(ii)(a) and withdrew the investment allowance in both the years in question. However, the CIT(A) on appeal, held that allotment of assets and liabilities upon the dissolution of the assessee did not amount to transfer within the meaning of Section 155(4A) and Sec. 32A(4) and there is no justification to withdraw the investment allowance. The ITAT confirmed the view of CIT(A) on the basis of decision of Hon'ble Supreme Court in the case of *Malabar Fisheries Co. vs. CIT, Kerala* (supra) and that of *CIT vs. S. Balasubramaniam* 138 ITR 815 and other cases. The facts are similar in the case in hands and we are also of the opinion that the view of ITAT Ahmedabad Bench 'A' in the case of *ITO vs. Pratik Prints* (supra) in which one of us (Shri B.M. Kothari, Accountant Member) was the author of that order, is fully applicable here and we conclude that the learned CIT(A) has rightly allowed the appeals of the assessee.

So far as A.Y. 1982-83 is concerned, the ITO has rejected the claim of investment allowance and this aspect has also rightly been discussed by the CIT(A) in para 14 of his order. There is no need to interfere in the order on the basis of law referred to above.

On the basis of above discussions, we are of the opinion that the appeals of revenue have no force and the same are dismissed.

(1995) 126 Taxation 12 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

AMRITSAR BENCH, AMRITSAR

(Before Shri S. Grover, Judicial Member)

ITA Nos. 331 (ASR;/1993)

Assessment Year 1991-92

M/s Harpal Singh Jaswant Singh

vs.

Income-tax Officer

For the Appellant	:	**Sudhir Sehgal, Advocate and Ashwani Juneja, I.T.P.**
For the Respondent	:	**J.S. Arora, Sr. D.R.**
Decided on	:	18-1-1994

PENALTY — Assessee a Kacha Arhtia — Selling Agricultural Produce of Agriculturists on commission basis and keeping their money in safe custody etc. — ITO noticed various accounts where credit balances were there of Agriculturists — Assessee pleaded money of Principals lying in safe custody after sale of their produce

— ITO treating these credits as deposits and Deputy Commissioner levied penalty u/s 271D — Held such credits not deposits or loans — Penalty cancelled.

Income-tax Act, 1961 — Sections 269SS & 271D.

CBDT Circulars 387 dt. 6-7-1984 and 556 dt. 23-2-1990.

FACTS

The assessee firm had been acting as Kacha Arhtia and charging commission from his Principals, on sale proceeds of their Agricultural produce. In addition he also used to keep their money i.e. sale proceeds of Agricultural produce in safe custody till it was taken back. The ITO noticed various credit accounts in the books of assessee and treated the same as loans/deposits received in cash exceeding Rs. 20,000/- u/s 269SS of the I.T. Act. He also referred the matter to the Deputy Commissioner who in turn imposed penalty u/s 271D of the Income-tax Act. In appeal the CIT(A) allowed partial relief to the assessee. The assessee filed a second appeal.

DECISION

Following Tribunal's decision in the case of *Muthoot M. George Bankers vs. Asstt. Commissioner of Income-tax* (1993) 46 ITD 110 and CBDT circular No. 556 dt. 23-2-1990 (1990) 183 ITR (St.) 92, wherein it had been clarified "that Kacha Arhtia sells goods belonging to an Agriculturist and the sale proceeds thereof which remain with him cannot be regarded as a deposit and where only a part of sale proceed is remitted the balance will not assume the character of a deposit", the Hon'ble Tribunal cancelled the penalty imposed by the Deputy Commissioner u/s 271D for default u/s 269SS.

Cases referred to :

1. *Muthoot M. George Bankers vs. ACIT* 46 ITD 110 (Trib.)
2. *CIT vs. Bazpur Coop. Sugar Factory Ltd.* 172 ITR 321 (SC)
3. *Hindustan Steel Ltd. vs. State of Orissa* (1972) 83 ITR 26 (SC)
4. *ITO vs. Lakhani Enterprises* (1990) 185 ITR 595 (AP)

Full text of the Order is given below :

ORDER

This second appeal is directed against the order dated 28-1-1993 passed by the Commissioner of Income-tax (Appeals), Bhathinda, hereinafter referred as the CIT(A), by which he only gave partial relief in relation to penalty imposed by the Assessing Officer under section 271D of the Income-tax Act, 1961, hereinafter referred as the Act, in respect of assessment year 1991-92. The contention is that there was no violation of provisions of section 269SS of the Act and, therefore, imposition of penalty was not justified.

The Assessing Officer by noticing and observing that there had been violation of the provisions of section 269SS of the Act as the assessee had accepted loans/deposits of Rs. 20,000 and above from various persons during the year otherwise than by payees account cheques or payees account bank drafts referred the case to the DCIT for examination and processing of the case under section 271D of the Act. Accordingly, a show cause notice was issued with respect to acceptance of the following amounts, which according to the Assessing Officer was in violation of the provisions of Section 269SS of the Act as follows :-

1.	Smt. Sukhdev Kaur	Rs.	66,480/-
2.	Sh. Vijay Kumar	Rs.	25,000/-
3.	Sh. Gurmit Singh	Rs.	28,000/-
4.	Smt. Parkash Kaur	Rs.	40,000/-
5.	Sh. Kaur Singh	Rs.	1,00,000/-
6.	Sh. Harbans Singh	Rs.	40,000/-
7.	Sh. Teja Singh	Rs.	35,000/-
8.	Sh. Jaswinder Singh	Rs.	1,18,570/-
9.	Sh. Jaswant Singh	Rs.	41,700/-

The assessee responded to the show-cause notice (supra) by submitting in writing as under :-

"that the assessee firm is a regd. firm doing business of Kacha Arhtia. Kacha Arhtia acts only as an agent of his constituent and never acts as a principal. The remuneration of Kacha Arhtia consists solely of commission and he is not interesting in the profit and losses made by his constituents and he has no personal interest of his own when he enters into a transaction and his interest is limited to the Commission Agent's charges and certain out of pocket expenses. In the instant case the persons mentioned in the notices are all agriculturists (except Shri Vijay Kumar Accountant) and are principals of the firm M/s Harpal Singh Jaswant Singh, Malout acting as agent on their directions for selling agrl. produces and doing other activities such as keeping their money in safe custody as per normal practice in his trade and for this purpose the Kacha Ahrtia called Mahajan or Small Bankers the term as used by the Reserve Bank of India.

From the above it is clear that the firm had not accepted any loan or deposit from any other persons but had kept the money of their principal under their directions in safe custody. This fact also gets support that on most of the dates the firm is having huge cash in hand and sometimes money was kept in the evening and taken back after few days. These all acts and transactions are part and parcel of the business and for doing these services the agriculturists bring their produce to the agent

and he charges only commission from them. The loan or deposit is always taken from outsider for the purposes of running business.....As such there is no question of application of provisions of sections 269SS and 269T. Moreover, if there is any violation of the provisions of sections 269SS and 269T then the violation was under a *bonafide* belief that Kacha Ahrtia can keep money in safe custody of their constituents under the circumstances explained above."

The DCIT after analysing the facts held that in respect of Shri Harbans Singh (Rs. 40,000/-) and Shri Jaswinder Singh (Rs. 1,18,570/-), there was violation and, therefore, no penalty was leviable under section 271D of the Act. In relation to Shri Jaswant Singh (Rs. 41,700/-), the DCIT held that contravention could be in relation to Rs. 21,300/- and not Rs. 41,700 and, therefore, penalty was to be modified on that score also.

At this stage, it must be mentioned that the assessee was not held to be guilty of violation of section 269SS of the Act particularly in respect of Shri Jaswinder Singh on the ground that the receipts in cash for which penal proceedings (supra) were initiated related to the sale proceeds of agriculturist produce, which were being paid regularly from time to time and perusal of the account of Shri Jaswinder Singh revealed that the assessee had been accepting as well as repaying the cash amount, which included repayments of the sale proceeds of agricultural produce. The case, therefore, has to be viewed in such light and submissions in writting by the assessee, the factual aspects of which have not been controverted.

Before the CIT(A), the assessee reiterated he contentions raised before the Assessing Officer and the Officer imposing penalty but he rejected the appeal and it is considered penalty expedient to reproduce paras 5, 5.1 and 5.2 of his order :-

"5. I have given carefull consideration to the entire matter and I am not inclined to agree with the plea of the ld. counsel. The argument that assessee was under a *bonafide* belief that payments from agriculturists were not covered by section 269SS is not borne out from the record. The plea taken before me that w.e.f. 1-4-1989 2nd provision to section 269SS was inserted which exempted transaction between Agriculturists having no taxable income, was the basis for the bonafide belief on the part of the assessee firm, is not tenable since the assessee is having taxable income for the last several years and there is no reason or basis for the appellant to believe that loans taken from the agriculturists were not covered by the provisions of section 269SS. The appellant firm is being assessed to tax for the last several years and provisions of section 269SS were introduced w.e.f. 30-6-1984. The appellant firm is having the benefit of competent legal advice and as such I am not satisfied that the appellant was under *bonafide* as pleaded by the ld. counsel. The case of the appellant is not covered by 'reasonable

cause' as provided in section 273-B. It is also seen that short-term loans in question were raised at the instance of the assessee although in the affidavits and statements filed by the creditors, they had stated that the amount was given as 'Amanat'. The amounts raised are, therefore, squarely covered by the provisions of section 269SS and penalty under section 271-D is exigible on the facts and circumstances of this case.

5.1 As regards the explanation given in respect of Shri. Jaswinder Singh is concerned, the same appears to be correct since the DCIT has himself mentioned on page 3 of the penalty order that there was a credit balance in the account of S. Jaswinder Singh to the tune of Rs. 6714/- when the amount of Rs. 7000/- was accepted from him on 20-1-1991. Thus after taking the second amount of Rs. 14300/- on 23-1-1991, the net credit balance would work out to Rs. 14586/-, total amount being less than Rs. 20,000 penalty is not exigible. The ground taken by the DCIT that debit balance was on account of payment of agrl. produce is not tenable. The debit balance in any case is required to be considered while considering the cash received on 20-1-1991 to the tune of Rs. 7000. Since the net cash loan did not exceed Rs. 80,000 there was no violation of section 269SS. Penalty in respect of this amount is deleted.

5.2 The reliance is placed by the ld. counsel on the decision of Hon'ble Madras High Court in the case of Smt. A.B. Shanthi Devi is clearly distinguishable since the decision was given with reference to sections 276-DD which provided very stringent punishment i.e. imprisonment for a period of upto 2 years and fine equivalent to the amount of borrowings. Sec. 276-DD has since been substituted by section 271-D which provides only fine equivalent to the amount of borrowings. As such the penalty under section 271D is not covered by the decision of Hon'ble Madras High Court. However, the matter is pending for decision before the Hon'ble Supreme Court and there is no judgment of this jurisdictional High Court on sec. 271-D."

For the appellant, Shri Sudhir Sehgal, Advocate, submitted that it was not a case where the penal provisions of sections 269SS and 271D of the IT Act, 1961 should have been invoked at all. The submission was that the purpose of bringing section 269SS of the Act on the Statute Book was entirely different than the attitude adopted by the Income-tax Authorities in the present case. He submitted that the scope and effect of section 269-SS of the Act, as also of section 276DD have been elaborated in the following portion of the department circular No. 387, dated 6th July, 1984, as under :-

"(xxiv) Prohibition against taking or accepting certain loans and deposits in cash :-

32.1 Unaccounted cash found in the course of searches carried out by the Income-tax Department is often explained by taxpayers as

representing loans taken from or deposits made by various persons. Unaccounted income is also brought into the books of account in the form of such loans and deposits, and taxpayers are also able to get confirmatory letters from such persons in support of their explanation.

32.5 Fears have been expressed in certain quarters that the provisions will adversely affect the rural sector and farmers who bring produce to mandies for sale. The prohibition contained in section 269SS is confined to loans and deposits only and does not extend to purchase/ sale transactions."

Relying on he above portion of the circular, he submitted that the assessee, a Kuchha Arhtia of agricultural produce was not receiving loans or deposits as the term is understood in normal business parlance but was dealing with agriculturists and, therefore, cash transactions, which entirely related to agriculturists could not come within the ambit of the prohibition of section 269SS of the Act and in any case and which was alternative submission, the assessee was under *bonafide* belief that Kacha Arhtia could keep money in safe custody of their constituents.

Next, Shri Sudhir Sehgal, Advocate relief on the Tribunal's judgment in the case of *Muthoot M. George Bankers vs. Asstt. Commissioner of Income-tax* cited as (1993) 46 ITD 10 for his submission firstly that in every case receipt of cash cannot have the effect of penalising the assessee. In that case payments received from sister concerns were not held to be violative of section 269SS of the Act and secondly the provisions of section 271D of the Act were held to be not mandatory and if assessee showed reasonable cause and *bonafide* belief penalty was held to be not leviable.

For the revenue, Shri J.S. Arora, Sr. D.R. relied on the reasonings given by the first appellate authority and the order imposing penalty. After giving my thoughtful moments, I accept both the contentions of Shri Sudhir Sehgal. The first aspect which impresses me is that the purpose of the provisions of sections 269SS and 271D of the Act is not to penalise persons having genuinely accepted transactions, which cannot even attract suspicion of being bongus much less providing these as fictitious.

Secondly and which is independent of the above the assessee entertained *bonafide* belief in the present case that it being a Kacha Arhtia and its dealing being with agriculturists, it could not be held guilty of violation of section 269SS of the Act if cash was kept by him of the constituents because if it was to purchase agricultural produce itself cash could have been paid because agriculturists may not even have bank accounts and in such case also in my considered view there would be no violation of section 269SS of the Act.

The Tribunal's decision in the case of *Muthoot M. George Bankers* (supra) is also applicable and for that purpose, I would like to bring in close focus paras 11 and 12 of the said decision, to emphasis that *bonafide* belief

has the effect of exonerating assessee particularly the type of one before me from the penal consequences of the provisions of section 69SS read with section 271D of the Act :-

> "11. Without prejudice to his contention that the penalty is leviable in this case, Shri Srinivasan contended that the provisions of sections 271D and 271E are not mandatory but are only directory and, therefore, it is not in every case that penalty can be levied. On the other hand, Shri C. Abraham contended that the language of the impugned section do not permit of such interpretation. We have carefully considered the submissions. In both the sections, the expression "shall be liable to pay" is found. On similar expressions that are found in sections 276DD and 276E, as they stood then prior to their omission with effect from 1-4-1989, the Andhra Pradesh High Court in the case of *ITO vs. Lakshmi Enterprises* (1990) 185 ITR 595 held that the word 'liable' used in the section gives discreation to the Court with regard to the imposition of fine. The Court may either chose to impose fine or may dispense with the imposition of fine. It cannot be said that the Court has no discretion with the imposition of fine. It cannot be said that the court has no discretion with regard to the quantum of fine to be imposed. Though this decision was rendered in the context of the old sections 276DD and 273E, since similar expression is used in sections 271D and 271E, we hold that the levy of penalty is not mandatory but is only directory in nature. Further the law is well settled that penalty will not be imposed merely because it is lawful to do so. In *Hindustan Steel Ltd. vs. State of Orissa* (1972) 83 ITR, 26, the Apex Court observed whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act. Further, in terms of section 273E penalty is not imposable if the person proves that there was reasonable cause for the failure to observe the statutory provisions. Thus, we uphold the contention of Shri Srinivasan that the impugned provisions (sections 271D and 271E) are only directory and not mandatory in nature.

Arguments were advanced before us on the merits of the case. The thrust of Sri Abraham's argument is that as the assessee had accepted or repaid deposits or loans in excess of Rs. 20,000 in cash, penalty was rightly sustained by the CIT(A). Sri Srinivasan, on the other hand, vehemently contended that the transactions are between the sister concerns. The managing partners is the same person for all these concerns and the transactions will not fall within the definition of either "loan" or "deposit" and even if they are construed s loans or deposits there is only venial breach

of the provisions and hence penalty in hefty sum of nearly Rs. 59 lakhs is totally uncalled for and unjustified. Having regard to rival submissions and the materials on record, we uphold the contention of Shri Srinivasan, the learned chartered Accountant. It is not in dispute before us that the assessee has accepted moneys in cash from its sister concerns or repaid the same in cash. Many of them are partnership firms and one of them is a limited company. It is also not in dispute that Sri S George, the managing partner of the assessee-firm is also the managing partner of the sister concerns. It is also not in dispute before us that Sri George managing partner of the assessee firm is also the managing director of the limited company nor it is in dispute before us that the transactions of alleged deposits or alleged loans or the repayments thereof are among the sister concerns *interm se*. It is also on record that the accounts of these concerns are managed from Kozhencherry where the minor partners are residing. Nor it is in dispute that there assessee and the sister concerns with which it had dealings bare all assessed to income-tax. In the circumstances can it be said that the taking of money from one firm by another firm or repayments thereof constituted deposits or loans so as to attract the provisions of sections 269SS and 269T? To make a deposit or loan, there must be at least two partners the giver and the receiver both in physical existence the legal existence the meaning of "deposit" and 'loan' has been succinctly explained at page 5735 of Chaturvedi and Pithisarila's income-tax Law, fourth edition, volumes, which is as follows :-

"Deposit & loan - these two are not identical in meaning - it is true that both in the case of loan and in the case of a deposit there is a relationship of a debtor and a creditor between the party giving money and the party receiving money. But in the case of a deposit, the delivery of money is usually at the instance of the giver and it is for the benefit of the person who deposits the money the benefit normally being earning of interest from a party who customarily accepts deposits. Deposits could also be for safe-keeping or as a security for the performance of an obligation undertaken by the depositor. In the case of a loan, however, it is the borrower at whose instance and for whose needs the money is advanced. The borrowing is primarily for the benefit of the borrower although the person who lends the money may also stand to gain thereby by earning interest on the amount lent ordinarily, though not always, in the case of a deposit, it is the depositor who is the prime mover while in the case of a loan, it is the borrower who is the prime mover. The other and more important distinction is in relation to the obligation to return the amount so received. In the case of a deposit which is payable on demand the deposit would become payable when the demand is made. In the case of a loan, however, the obligation to repay the amount arise immediately on receipt of the loan. It is possible that in case of deposits which are for a fixed period or loans which are for

a fixed period, the point of repayment may arise in a different manner. But by and large, the transaction of a loan and the transactions of making a deposit are not always considered identical."

Further, it has been held by the Apex Court in *CIT vs. Bazpur Co-operative Sugar Factory Ltd.* (1986) 172 ITR 321 that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it is made on the fulfilment of certain conditions. It is also pertinent to note that it is only with effect from 1-4-1989 and not before that the meaning of "deposit" is enlarged so as to include "deposit of any nature" in the case of a person other than a company. Against this background, we examined the transactions between the sister concerns and the assessee. There are transfer of funds from and to the sister concerns. There is no evidence to show that money was loaned or kept deposited for a fixed period or repayable on demand. Further, the sister concerns and the assessee are owned by the same family group of people with a managing partner with centralised accounts under the same roof . Therefore funds have taken place in a whimsical manner. Therefore, it is rather difficult to say that the transactions are in the nature of deposits or loans with certain conditions attached to them, either as regards the period of such deposits or loans or with regard to their repayments. From the copies of the accounts furnished before us all that can be gathered is that funds have been transferred from and to the sister concerns as and when required and since the managing partner is common to all the sister concern, the decision to transfer the funds from oneconcern to another concern or to repay the funds could be said to have been largely influenced by the same individual. In other words, the decision to given and the decision to take rested with either the same group of people or with the same individual. In such circumstances of the case, we hold that the transactions inter se between the sister concerns and the assessee cannot partake of the nature of either "deposit" or "loan", though interest might have been paid on the same. Excepting for the transfer of funds being witnessed in the books of accounts of the concerned firms, no material is on record to show issue of receipt or pronote in evidence of accepting a deposit or accepting a loan. Therefore, we hold that the transactions as are found in the books of accounts of the assessee cannot be termed as deposits or loan as understood in common parlance. It only represents diversion of funds from one concern to another depending upon the exigencies of the business. Further, the transactions have not been impeached as non-genuine or bogus. Hence the provisions of sections 269ss and 269T are not attracted to the facts of the case. Even if they were to apply in the facts and circustances explained above, the action of the assessee firm in accepting the funds in cash or making the refunds of such funds in cash can be ascribed to its *bonafide* belief that it would

not attract the provisions of section 269SS or 269T gives the nature of the transactions and the circumstances of the its case. *Bonafide* belief coupled with the genuineness of the transactions will constitute reasonable cause for not invoking the provisions of sections 271D and 271E. In this view of the matter also we cancel the order of penalty under section 271D and 271E."

I also like to refer to circular No. 556 dated 23-2-1990 issued by the Central Board of Direct Taxes reported as (1990) 183 I.T.R. (St.) page 92 and like to reproduce paras 3 and 4 as follows :-

"3. A number of references have been received by the Board seeking clarification whether the sale proceeds of agricultural commodities, left over by the agriculturists with their 'Kacha Arhatiyas', would also come within the ambit of deposit of any nature necessitating its repayment by an account payee cheque as provided under section 269T of the Act.

The Board is of opinion that there a "Kacha Arhtiya" sells goods belonging to an agriculturist, the sale proceeds thereof which remain with him cannot be regarded as a deposit made by the agriculturist with the "Kacha Arhatiyas". Further, where the 'Kacha Arhatiya' remits only a part of the sale proceeds to the agriculturist, the unremitted part of the sale proceeds would also not assume the character of a deposit. Therefore, the repayment of such sale proceeds does not fall within the purview of section 269T of the Act."

In the result, relying on the above and on more than one count, I cancel the penalty and allow the assessee's appeal.

(1995) 126 Taxation 21 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

AMRITSAR BENCH, AMRITSAR

(Before Shri S. Grover, Judicial Member)

ITA No. 405 (ASR)/1993

(Assessment Year 1991-92)

Income-tax Officer

vs.

M/s Harpal Singh Jaswant Singh

For the Appellant	:	**J.S. Arora, Sr. DR.**
For the Respondent	:	**Sudhir Sehgal & Ashwani Juneja, I.T.P.**
Decided on	:	18-1-1994

PENALTY — Assessee Kacha Ahrtia working on commission basis — Various credit accounts noticed by AO — Assessee claiming money belonging to Agriculturists after sale of their produce lying

in safe custody — Assessing Officer treating loans or deposits — DC levying penalty u/s 271E for repayments in cash — Held CIT(A) justified in cancelling penalty — Additionally assessee was held to be prevented by sufficient cause — Revenue's appeal dismissed.

Income-tax Act, 1961 — Secs. 269SS, 269T, 271D & 271E

FACTS

The assessee was acting as Kacha Ahrtia or on agent of his constituents on commission basis. The Assessing Officer noticed certain credits in the books of account. The assessee pleaded that the money belonged almost all to the agriculturists and that the assessee had been acting as an Agent on their direction for selling agricultural produce and doing other activities such as keeping their money in safe custody as per the practice in this trade. It was thus alleged that the firm did not accept any loan or deposit from any person but kept the money of their principals under their direction in safe custody. It was also pleaded that even if there was any violation of section 269SS or section 269T it was under a bonafide belief that the Kacha Arhtia could keep money in safe custody of their constituents. The Revenue, however, did not agree with the submissions of the assessee and the Deputy Commissioner imposed a penalty of Rs. 1,150,000/- u/s 271E of the Act for repayments made in cash. The CIT(A), however, deleted the penalty imposed and the revenue filed a second appeal.

DECISION

The Hon'ble Tribunal concurred with the reasons given by CIT(A) for cancelling the penalty. Independent of that order the Hon'ble member also cancelled the penalty on the ground which was pleaded before CIT(A) regarding *bonafide* belief that payments to agriculturists were not hit by section 269T of the Act. In the result the appeal of the Revenue was dismissed.

Cases referred to :-

1. *Kumari A.B. Shanthi (Alias) Vennira Adai Nirmala vs. A.D.I (Investigation)* (1992) 197 ITR 330 (Mad.)
2. *M/s. Penwalt India Ltd. & Ors.* (Bom.)

Full text of the Order is given below :

ORDER

In this Revenue's appeal, the order dated 28-1-1993 passed by the Commissioner of Income-tax (Appeals), Batinda hereinafter referred as the CIT(A), by which he cancelled the penalty of Rs. 1,50,000/-, which had been levied under section 271E of the Income-tax Act, 1961 hereinafter referred as the Act, in respect of assessment year 1991-92 is contested.

The Assessing Officer issued show a cause notice to the assessee on 2-7-1992 with respect to payment to the following persons on the ground that the assessee had contravened the provisions of section 269T of the Act :-

1.	Sh. Vijay Kumar	Rs.	25,000
2.	Kaur Singh	Rs.	1,00,000
3.	Harbans Singh	Rs.	40,0000
4.	Jaswinder Singh	Rs.	1,64,979
5.	Jaswant Singh	Rs.	21,225

The assessee responded and made written submissions as follows :-

> "that the assessee firm is regd. firm doing business of Kacha Ahrtia. Kacha Ahrtia acts only as an agent of his constituent and never acts as a principal. The remuneration of Kacha Ahrtia consists solely of commission and he has not interested in the profit and losses made by his constituents and he has no personal interest of his own when he enters into a transaction and his interest is limited to the commission agent's charges and certain out of pocket expenses. In the instance case the persons mentioned in the notices are all agriculturists (except Shri Vijay Kumar Accountant) and are principals of the firm M/s Harpal Singh Jaswant Singh, Malout acting as agent on their directions for selling agrl. produce and doing other activities such as keeping their money in safe custody as per the normal practice in this trade and for this purpose the Kacha Ahrtia called Mahajan or small Bankers the term as used by the Reserve Bank of India. From the above it is clear that the firm had not accepted any loan or deposit from any other persons but had kept the money of their principals under their directions in safe custody. This fact also get support that on most of the dates the firm is having huge cash in hand and sometimes money was kept in the evening and taken back after few days.
>
> These all acts and transactions are part and parcel of the business and for doing these services the agriculturists bring their produce to the agent and they charge only commission from them. The loan or deposit always taken from outsider for the purpose of running business. As such there is no question of application of provisions of sections 269SS and 269T.
>
> Moreover if there is any violation of the provisions of sections 269SS and 269T then the violation was under a *bonafide* belief that the Kacha Ahrtia can keep money in safe custody of their constituents under the circumstances explained above".

The DCIT, who processed the penalty proceedings, exonerated the assessee in respect of payments of Rs.164979 and Rs. 21,225/- made to Shri Jaswinder Singh and Sh. Jaswant Singh, but levied penalty in relation to

payments of Rs. 1,00,000 and Rs. 40,000/- to Shri Kaur Singh and Shri Harbans Singh respectively and reduced the charge in respect of payments to Shri Vijay Kumar to Rs. 10,000/-.

The learned CIT(A) cancelled the penalty and I would like to reproduce para 5 to give his reasons for doing so with which I agree :-

"5. I have given careful consideration to the entire matter and I have also examined the statements of persons to whom repayments were made in cash. In their statements they had stated that the amount was given as an Amanant and no interest had been charged by the creditors. Since these amounts were taken in cash penalty on this account has already been confirmed by me vide appeal order No. CIT(A)/IT/VTI 404/1992-93 of even date (penalty imposed being u/s 271-B). It is also seen that these amounts were given by the creditors to the appellant firm at the instance of the appellate firm since the appellant firm needed the money. As such all these amounts clearly fall within the definition of loan as distinguishable from deposit. In the case of a deposit, the delivery of money is at the instance of the giver and it is for the benefit of person who deposited the money. The benefit normally baing earning of interest from a party who customarily accepts deposits. In the present case no benefit in the shape of interest has been earned by the creditors and the assessee firm is not a party customarily accepting the deposit and paying interest at scheduled rates. Thus in view of the decision of Hon'ble Bombay High Court in the case of *M/s. Pennwalt India Ltd., & others* quoted supra, these amounts do not come within the definition of a deposit and as such provisions of section 269-T are not applicable. The famous authors Chaturvedi and Pithisaria have also mentioned on page 5735 of their latest commentary-Volume-5 that deposit and loan are not identical in meaning although the relationship of debtor and creditor is there in both the cases. That in the case of deposit the delivery of money is at the instance of the giver and it is for the benefit of depositor i.e. earning of interest from a party that customarily accepts the deposits. That deposits made could also be for safe-keeping or as a security for the performance of an obligation, undertaken by the creditor. That in the case of loan it is for the borrower at whose instance and for whose needs the money is advanced. That borrowing is primarily for the benefit of the borrower although the person who lends money may also stand to gain thereby by earning interest. The learned Authors have referred to the decision of *Pennwalt India Limited* as quoted supra as also the case of *M/s Durga Parsad Mandela* (1987)-61-Comp. Cas. 479-(Bom.).

Seen in the light of the above position, the creditors did not derive any benefit whatsoever on the short term loans given to the appellant firm. Nor the amounts were given for performance of obligation undertaken

by the creditors. As such, these amounts cannot be called deposits and do not fall within the purview of section 269-T.

As regards the plea of the learned counsel that the assessee was under *bonafide* belief that payments to the agriculturists were not covered by section 269-T, I am not inclined to agree with this plea in view of the detailed discussion recorded by me in appeal order in the case of the appellant vide appeal No. CIT(A)/IT/BTI/404 of even date while deciding penalty under section 271-D.

The reliance placed by the ld. counsel on the decision of Hon'ble Madras High Court in the case of *Kumari A.B. Shanthi* is clearly distinguishable since the decision was given with reference to section 276-DD which provided very stringent punishment i.e. imprisonment for a period of upto 2 years and fine equivalent to the amount of repayment. Section 271-E provides fine equivalent to the amount of repayment. As such penalty under section 271-E is not covered by the decision of Hon'ble Madras High Court. Moreover, the matter is pending for decision before the Hon'ble Supreme Court and there is no judgment of the jurisdictional court on section 271-E".

The CIT(A), however, did not accept the contention that the assessee was under *bonafide* belief that payments to the agriculturists were not covered by section 269-T of the Act. The CIT(A) further did not accept the assessee's contention that in view of the Hon'ble Madras High Court judgment in the case of *Kumari A.B. Shanthi (Alias) Vennira Adai Nirmala vs. Asstt. Director of Inspection, Investigation* cited as (1992) 197 ITR 330 wherein the provisions of section 276DD of the Act (prior to its substitution by section 271D) had been declared *ultra vires* of the Constitution of India and section 269SS of the Act had also been held to be violation of Article 14 of the Constitution of India penalty was not leviable.

I have already observed above that I agree with the reasonings of the CIT(A) for cancelling the penalty.

However, I would like to further add that independent of the CIT(A)'s order, I cancel the penalty on the ground which was pleaded before the CIT(A) regarding *bonafide* belief that payments to agriculturists were not hit by section 269T of the Act for the reasons recorded by me vide my order of even date in the assessee's own case, in I.T.A. No. 331 (ASR)/1993 by which I have cancelled the penalty under section 271D of the Act, which was confirmed by the same CIT(A), who cancelled the penalty under section 271E of the Act in the present case.

In the result, I dismiss the revenue's appeal but on more than the counts as observed above.

(1995) 126 Taxation 26 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH

(Before Shri J. Kathuria and Shri N.K. Agrawal)

ITA No. 965/Chandi/88

(Assessment Year 1983-84)

Income-tax Officer

vs.

Gian Chand, Labour Contractor

For the Appellant	:	**Gagan Sood**
For the Respondent	:	**M.P. Aggarwal**
Decided on	:	10-6-1994

ADDITION — Assessee labour contractor — Receiving payments from FCI for work done — Making payments to New Truck Operators Union for services obtained — ITO holding part of the cash payments to union not proved — He applied rate on gross receipts — Also holding expenses being found not vouched in some cases not proved — Held in view of certificate of union payments proved — Rate to be applied on net receipts — Expenses incurred also proved — ITO also adding Rs. 44,250 as other sources income — Held source proved — CIT(A)'s order confirmed and Revenue's appeal dismissed.

Income-tax Act, 1961 — Sections 68 and 145.

FACTS

Assessee a labour contractor was doing work for FCI in regard to labour and trucks. During the year the assessee received total payments of Rs. 25,42,127/- from FCI. The assessee had paid Rs. 20,11,780/- to the New Truck Operators Union from the gross receipts. Rs. 11,45,650/- were paid by cheques and Rs. 8,66,130/- were paid in cash to the Union. Out of the balance receipts Rs. 5,05,453/- was shown as other expenses and Rs. 24,895/- was shown as income. The ITO held that cash payments to the Union were not fully proved. Likewise he found expenses not properly vouched. He applied a rate of 8% on gross receipts and worked out the income at Rs. 2,03,000/-. The ITO also added Rs. 44,250/- as income from other sources the credit in books having been were held as fictitious. In view of the certificate of the Union and the statement of the person who wrote Union's books the CIT(A) accepted the genuineness of the payments and the other expenses also and directed the ITO to deduct the payments to Union while applying the rate. The CIT(A) also held that the deposit was out of imprest money and also when a/cs were rejected and in income estimate no further addition on this score was called for. Revenue filed second appeal.

DECISION

The Hon'ble Tribunal observed that the payments to the Union stood duly proved on the basis of the certificate of the Union and the statement of Shri Surjan Singh. Regarding expenditure incurred the CIT(A) took correct view as the ITO did agree before him that payments stood verified regarding addition of Rs. 44,250/-. The CIT(A) agreed that amount represented the security money taken by the FCI from the bills. Shri Surjan Singh of the Union was given some money as imprest amount for realisation. The money was returned by Shri Surjan Singh and it was on a/c of certain confusion that the ITD took an adverse note of it. CIT(A) also held that when net profit rate had been applied there was no accession to make any other addition. On the facts the Hon'ble Tribunal concurred with the order passed by the CIT(A) and dismissed the appeal filed by the revenue.

Case referred to :

K.S. Guruswami Goudder (92 ITR 90) Madras.

Full text of the Order is given below :

ORDER

(N.K. Agrawal, J.M.)

In this appeal by the revenue relating to assessment years 1983-84, ground No.1 is against the direction given by the CIT(A) to the ITO to deduct payment amounting to Rs. 20,11,780/- made by the assessee to the New Truck Operators Union from the given receipts. The facts are that the assessee was a labour contractor and was being assessed in the status of a partnership firm. The assessee-firm showed receipts from the FCI at Rs. 25,40,127/-. Payments on account of freight etc were claimed to have been made to the New Truck Operators Union. The assessee filed a certificate from the said Union in support of the claim regarding payment of Rs. 11,45,650/- by cheques and Rs. 8,66,130/- in cash. Sh. Surjan Singh, Manager of the Union, was examined by the ITO. One 'rahi' for the period from 1-7-1982 to 31-3-1983 and two register from 1-4-1983 were produced. These books of account of the Union were impounded by the ITO u/s 132. The ITO held that the rahi of the Union was a fabricated record. In this rahi. Truck numbers and the names of the persons were recorded but the number of trips by each truck was not entered. The ITO rejected the books and applied the provisions of section 145(2). The assessed income from contract work was estimated at Rs. 2,03,000/- @ 8% on total receipts amounting to Rs. 25,42,127/-. The assessee had declared income at Rs. 24,895/- in the return. The ITO noted that the expenditure at Rs. 5,05,453/- had been shown in in the profit and loss account but these payments were not supported by vouchers.

2. The assessee went in appeal and pleaded that whatever money was received from the FCI had been duly shown by the entire receipts could

not be held to be the income. The assessee had to incur expenditure not only on freight of the trucks but also in connection with many other items like salary, stationery, etc. A certificate confirming payment to the Union was filed. Sh. Surjan Singh admitted before the ITO that freight was received from the assessee. Statement of one Sh. Roop Chand was also recorded, who was said to have written the Wahi of the Union. Said Sh. Roop Chand admitted that he wrote the wahi on the basis of certain loose sheets. On this basis, the ITO concluded that the wahi of the Union was a fictitious document prepared from the loose sheets. Therefore, payment to the Union was held to be doubtful. The CIT(A), however, accepted the payment made to the Union on the basis of the evidence—documentary as well as oral. It was held that the payments made by the assessee could not be rejected on mere suspicion when the Union had confirmed the receipt. As regards other expenditure shown at Rs. 5,05,453 it was noted that the assessee had incurred certain expenditure on wages and salary and details were available. Vouchers were, of course, not produced. The labourers had left the place of work and they also could not be produced. The CIT(A) accepted the evidence produced and held that the assessee had made certain payments during contract work.

3. The ld. D.R. has supported the order of the ITO on the ground that the wahi of the Union was a fabricated document as was clear from the statement of Sh. Roop Chand, who had prepared the wahi. It was a document after investigation had been started. On this basis, the ld. D.R. has argued that the payments made to the Union was not proved by adequate evidence.

4. The ld. counsel has, in reply, contended that the payment of Rs. 11,45,650/- was made by cheques and was also verified by the ITO during the hearing of the appeal before the CIT(A). Cash payment of Rs. 8,66,130/- is also said to have been duly verified at the appellate stage, from bank withdrawals. On the basis of this verification, the ld. counsel has submitted that the entire payments to Union stand duly verified and simply because records of the Union were not found in order, the payments made by the assessee could not be discarded/rejected. The assessee did loading and unloading of gunny bags from mandi to the godowns of the FCI and from FCI godowns to the Railway Station. The assessee had to incur expenditure on freight as well as labourers. The CIT(A) applied the net profit rate of 8% as on the net receipts of Rs. 5,28,347/-. The rejection of the books has been upheld by the CIT(A). The assessee is, however, not in cross-appeal and we have nothing to comment on the rejection of the books. As regards the order of the CIT regarding the expenditure incurred by the assessee, we find that he has taken a correct view in the matter because the ITO did agree before the CIT(A) that the payments stood verified. Therefore, we agree with the ld. counsel that after the payments stood verified, there was nothing adverse against the assessee to warrant the rejection of the payments.

5. Looking to the entire facts of the case, we are of the view that the payments to the Union stand duly proved on the basis of the certificate dated 16-2-1984 obtained from the Union, and also in the light of the statement of Sh. Surjan Singh. When the receipt has been confirmed by the Manager, there is nothing to raise a suspicion. The Union might to maintaining books in a manner which may not be appropriate but that also could not make the assessee responsible for the books. The payments stand verified by the CIT(A) at the time of hearing and in the presented the ITO. The ld. counsel has placed reliance on a decision of the Madras High Court in the case of *K.S. Guruswami Goudder* (92 ITR 90) to put forth the proposition that the cost of material supplied to the contractor by the Govt. cannot be included in the total receipts for computing the contractor's income. On the same analogy, the ld counsel has submitted that the payments made for carrying on contract work had to be taken out from the gross receipts. Ground No. 1 has, therefore, no force and is rejected.

6. Ground No. 2 in against the deletion of addition of Rs. 44,250/- made by the ITO on account of income from other sources. The ITO found that the assessee had inflated cash balance by Rs. 44,250/- by showing cash receipt from the FCI. The ITO was of the view that this receipt was shown fictitiously because payment of Rs. 50,000/- to the Union was required to be entered in the cash book. Therefore, the assessee introduced his own funds and made a fictitious entry for Rs. 44,250/-. The CIT(A), however, agreed with the assessee's contention that the amount represented the security money which had been already taken by the FCI from the bills. Sh. Surjan Singh had actually been given some money as imprest amount for realisation. That money was, however, returned by Sh. Surjan Singh and it is on account of certain confusion arising from that amount that the ITO took an adverse note of it. The CIT(A) looked into the nature of entries and found that the money was actually receivable from the FCI, but the entry had been made in respect of the amount which had been given to Sh Surjan Singh as imprest money. The CIR(A) also noted that when net profit rate had been applied, there was no occasion to make any other addition.

7. The ld. D.R. has supported the order of the ITO whereas the ld. counsel has challenged the same on the ground that second addition was not warranted at all and so has been rightly held by the CIT(A).

8. Looking to the facts of the case, we agree with the CIT(A) that no further addition is warranted when the net profit rate has been applied after rejection of the books of the assessee. Therefore, ground no. 2 also fails and is rejected.

9. In the result, the appeal stands dismissed.

(1995) 126 Taxation 30 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH

(Before Shri J. Kathuria and Shri N.K. Agrawal)

ITA No. 1383/Chandi/89

(Assessment Year 1986-87)

M/s Oswal Spinning Industries, Ludhiana
vs.
Income-tax Officer

For the Appellant	:	**Hari Om Arora**
For the Respondent	:	**K.S. Negi**
Decided on	:	16-11-1994

BAD DEBT — Bad debt becoming irrecoverable in Asst. Years 1986-87 but not written off — Income-tax Officer disallowing the same — Bad debt written off in Asst. year 1987-88 — CIT (A) confirming disallowance in Asst. Year 1986-87 — Held, bad debt be allowed in Asst. Year 1986-87 — Write off in Asst. Year 1987-88 only a technical default.

Income-tax Act, 1961 — Sectons 36(2)(iv) and 155(6).

FACTS

In the return filed for the assessment year 1986-87 the assessee did not make any claim for bad debt which became irrecoverable on 20-2-1986 when the Distt. Judge gave a final verdict and no further appeal was filed. The assessee made the claim for bad debt of Rs. 67226 during the corse of assessment. But the ITO did not consider the same. On appeal the CIT(A) held that the debt became had in Asst. Year 1986-87 but as the same was written off in the books of account in assessment year 1987-88 it should be allowed in assessment year 1987-88. The assessee filed a second appeal before the Tribunal

DECISION

The Hon'ble Tribunal observed that the debt in question had definitely become bad in assessment year 1986-87 but it was not allowed as the same was not written off in the year under consideration. This was a hypertechnical approach on the part of CIT(A). Under section 155(6) of the Act if an amount was written off in a subsequent year but it was found that it had become bad in an earlier year, then the Assessing Officer had to pass a rectificatory order for the earlier year and allow the bad debt. Since the debt bad become had in the year under consideration there was nothing wrong in allowing the seame this year. The ITO was thus directed to allow the bad debt of Rs. 67,226/- during the Asst. Year 1986-87.

Full text of the Order is given on next page :

ORDER

(J. Kathuria, A.M.)

This appeal by the assessee pertains to assessement year 1986-87.

2. The only effective ground is against the disallowance of claim of bad debts of Rs. 67,226/- in the account of M/s. Gian Chand Amir Chand. The assessee firm filed its return of income for Assessment Year 1986-87 on 30-7-1986. At that time, no claim on account of bad debts was made by the assessee. During the course of assessment proceedings, however, the assessee made a claim of bad debt of Rs. 67,226/- in the account of M/s. Gian Chand Amrit Chand, on 4-11-1986. The Assessing Officer, however, did not deal with this issue in the assessment order. Later on, the ld. CIT(A) called for the comments of the Assessing Officer which were, however, not offered.

3. It was explained by the assessee before the ld. CIT(A) that originally the claim against M/s Gian Chand Amir Chand had been decreed in favour of the assessee. However, this decision was reversed in appeal by the District Judge on 20-2-1986. It was pointed out that though the amount in question had been written off in the subsequent year, the claim was allowable as a deduction in the year under consideration. The ld. CIT(A), however, held that a bad debt was allowable as deduction only. If it was written off in the previous year and since the debt in question had not been written off in the year relevant to the assessment year 1986-87 it was not allowable as a deduction. She further directed the Assessing Officer to allow this in the year in which the bad debt is written off.

4. Shri Hari Om Arora, the ld. counsel for the assessee, submitted that this claim of the assessee had not been allowed for assessment year 1986-87 because it had not been written off and it had also not been allowed in assessment year 1987-88 because no such claim had been made by the assessee. It was, therefore, submitted that it was ironical that the assessee was not getting any relief in any year. It was also pointed out that the matter had been finally decided by the District Judge on 20-2-1986 and that no further appeal had been filed before the High Court. It was submitted that the ld. CIT(A) accepted the fact that the debt in question had become bad but directed it to be allowed as a deduction only in the year in which it was written off. It was submitted that the view adopted by the ld. CIT(A) was highly technical and did not stand the scrutiny for a minute. Drawing our attention to the provisions contained in section 36(2)(iv) of the Income-tax Act, it was pointed out that where any such debit or part thereof is written off as irrecoverable in the accounts of the previous year and the Assessing Officer is satisfied that such debt or part thereof became bad in any earlier previous year, then the provisions of section 155(6) shall be applicable. It was, therefore, argued that even if the amount was actually written off in the subsequent year but the debt had become bad in the earlier

year, it could be allowed as a deduction in the earlier year by passing order u/s 155(6). It was, therefore, vehemently argued that the debt which was admittedly bad and had been written off in the subsequent year may be allowed as a deduction in the year under consideration.

5. The ld. D.R. relied on the impugned order.

6. After carefully considering the submissions of both the sides, we find merit in the submissions of the ld. counsel for the assessee. The debt in question had definitely become bad but it was not allowed as a deduction in the year under consideration by the CIT(A) only because it was not written off in the year relevant to assessment year 1986-87. This, in our opinion, was hypertechnical approach on the part of the CIT(A). As rightly pointed out by the ld. counsel if an amount is written off in a subsequent year but it is found that it had become bad in an earlier year, then the Assessing Officer had to pass a rectificatory order for the earlier year and allow the bad debt as a deduction u/s 155(6) of the Act. Since the debt has been actually written off in the subsequent year and had become bad in the year under consideration, we do not find anything wrong in allowing the same as an allowable deduction in the year under consideration. We accordingly direct the Assessing Officer to allow bad debt of Rs. 67,226/- in the year relevant to assessment year 1986-87.

7. In the result, the appeal is allowed.

(1995) 126 Taxation 32 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

CHANDIGARH BENCH

(Before Shri J. Kathuria and Shri N.K. Agrawal)

ITA No. 81 & C.O. No. 13/Chandi/90 &

ITA No. 178/ Chandi/90

(Assessment Year 1988-89)

Income-tax Officer

vs.

M/s S.R. Foundry & vice versa

For the Appellant	:	**K.S. Negi**
For the Respondent	:	**P.C. Jain**
Decided on	:	13-12-1994

ASSESSMENT — Production found low in some months as compared to consumption of hard coke — ITO making trading addition of Rs. 43,800/- — Held production depended on quality of raw material and of hard coke — Addition could not be sustained on suspicion — Revenue appeal dismissed with cross objection of assessee.

CAPITAL GAIN — Landed property owned and sold by firm — Consideration credited to partner's capital accounts and capital gain shown in the hands of partners — ITO assessing it in firm's hands and also shares in partner's hands — Held capital gain assessable in firm's hands and not again in the hands of partners.

Income-tax Act, 1961 — Sections 45 & 145.

FACTS

The assessee filed its return of income showing income of Rs. 1,05,040. The ITO noticed that the production was low and consumption of hard coke high in the months of September to December, 1987 and January-February 1988. He held, that the assessee had also done work outside the books of account thus made an addition of Rs. 43,800/- to the trading results. In appeal the assessee pleaded that the production depended on various factors like quality of raw material and hard coke used. Taking this into account and and also the results declared the CIT(A) delated the addition made by the ITO and the Revenue filed a second appeal and the assessee filed cross objection.

The assessee firm owned landed property which was sold by the firm and the capital gain was divided and credited to the personal accounts of the partners. Since the property was owned and sold by the firm and also shown as asset of the firm in Balance sheet, ITO taxed the capital gain of Rs. 35,300/- in the hands of firm. CIT(A) confirmed the ITO's order and the assessee filed second appeal.

DECISION

The Hon'ble Tribunal observed that the consumption of hard coke had been shown for every month and it was only the raw material which could not be shown monthwise. But that could not be the sole reason on which the production could be held to be incorrect. The Tribunal held that the production in foundry depended upon various factors including quality of raw materials and hard coke used. Therefore there was no justification for any addition. The Revenue' appeal as well as assessee's cross objection was this dismissed.

As regards capital gains, following the judgments in the cases of *Pearl Woollen Mills* (123 ITR 658) and *Vipin Kumar* (203 ITR 941) the Hon'ble Tribunal held that on facts the capital gain was taxable in the hands of the firm but the capital gain could not be assessed again in the hands of the partners. The appeal was allowed in part.

Cases referred to :

1. *Sajjan Bagaria* (113 ITR 430) Gauhati
2. *Pearl Woollen Mills* (123 ITR 658) P&H
3. *Vipin Kumar* (203 ITR 941) P&H

Full text of the Order is given below :

ORDER

(N.K. Agrawal, J.M.)

These are cross-appeals and cross-objection relating to assessment year 1988-89.

2. We shall first take up the revenue's appeal, wherein deletion of addition made in the trading account has been challenged. The assessee-firm derived income from foundry work (CI casting). Return was filed declaring total income at Rs. 1,05,040/-. The Assessing Officer noted that there was difference in the month-wise production as against consumption of hard coke. Production was found to be quite low, though consumption of hard coke was high in certain months. The Assessing Officer proceeded to determine the production. It was noted that the production was low and consumption of hard coke high in the months of September, October, November and December, 1987 and January and February, 1988. The Assessing officer was of the view that the assessee had done certain work outside the books of account. The assessee's plea was that monthly consumption of hard coke was verifiable from the books and the production depended upon the quality of coke and raw materials. In certain months, the production was indeed low, though the consumption of hard coke was high. The assessee's explanation was, however, not accepted and the Assessing Officer adopted average production at 45% and calculated the production at 73.09 qtls. The rate of Rs. 600/- per qtl. was adopted and addition of Rs. 43,800 was made.

3. The assessee went in appeal with the plea that variation in production and consumption of coke depended on various factors like quality of raw materials used. If the raw material was of thinner size or in small pieces, consumption of hard coke was less. If, however, the scrap was heavy and of thick quality, consumption of coke was said to be high. It was also explained that during the months in question in which the consumption of hard coke was high, light weight CI casting parts were manufactured. It was pointed out that the year under consideration, the assessee had shown better results in terms of total turnover as well as rate of profit. In this year, the assessee showed gross profit rate of 9.81%, as against 9.89% shown in the preceding year. The profit was accepted in the preceding assessment year. Since there was no defect in the books of account, rejection of the book results was said to be totally unwarranted. The assessee's plea found favour with the first appellate authority and the addition was deleted.

4. The ld. D.R. has submitted that the assessee had shown a low percentage in six months from September 1987 to February 1988. Average rate of 45% was rightly accepted.

5. The ld. counsel has, in reply, submitted that the assessee had maintained

hard coke register on day-to-day basis and also the stock register of the raw materials like pig iron, CI scrap, etc. It was simply on suspicion that high consumption of coke in certain months was found to be improper. The work of foundry depended upon various factors, like quality of hard coke and raw materials as well as labour force, weather conditions, running of furnace, etc.

6. Looking to the entire facts, we are of the view that a variation in production and consumption of hard coke had been properly explained and there was no sufficient material on record to reject the results. It is correct that in certain months, the consumption of hard coke was high and production was low but the assessee gave plausible and valid explanation in this regard. We find no reason to sustain the addition only on suspicion that the assessee had done production outside the books. The only reason on which the Assessing Officer proceeded was the absence of monthwise consumption of raw materials. As already seen, the consumption of hard coke had been shown for every month and it is only the raw material which could not be shown month-wise. But that could not be the sole reason on which the production could be held to be incorrect. We agree with the ld counsel that production in foundry depended upon various factors including quality of raw materials and that of hard coke. Therefore, there was no justification to make any addition in the trading account.

7. The revenue's appeal fails.

8. The cross-objection of the assessee has not been pressed by the ld counsel on the ground that the cross-appeal filed by the assessee would take care of the same. Therefore, the cross-objection stands dismissed as withdrawn.

9. In the assessee's appeal, the question relating to taxability of capital gains in the hands of the firm has been raised. The assessee showed capital gains amounting to Rs. 80,700/- on the sale of land measuring 14.66 marlas for Rs. 88,000/-. Cost of land was Rs. 7,300/-. The assessee-firm divided the amount of capital gains amongst the three partners and credited the amount in their accounts. The A.O. noted that the land in question had been purchased by the firm out of its own funds on 27-4-1976. The land was sold also by the firm. Therefore, a net capital gain determined at Rs. 35,300/- was held assessable in the hands of the firm.

10. The assessee went in appeal with the plea that the firm was not a distinct legal entity and, in view of that, the amount of capital gain was divided amongst the partners and was assessable in their hands. The appeal was, however, rejected.

11. The ld. counsel has contended that though the property was owned by the firm but all the partners had interest in the asset of the firm and they were entitled to receive the capital gains as cojoint owners. It was for this reason that sale price was transferred to the capital accounts of the three partners.

12. The ld. D.R. has, in reply, contended that the land in question had been purchased by the firm and was duly shown in the balance-sheet as the firm's asset. There was no justification to claim the assessability in the hands of the partners. Since the land was owned by the firm, capital gain did arise in the hands of the firm itself and was liable to be assessed as such.

13. The ld. counsel has, in counter-reply, submitted that though the land was purchased out of capital of the firm but it was not a trading asset and, in the eye of law, the three partners were cojoint owners. The transfer of sale price to the capital accounts of the partners was a correct step. It has been alternatively argued that, if at all, the amount of capital gain is held to be assessable in the hands of the firm, the same could not be made assessable in the hands of the partners. Out attention has been drawn to a decision of the Gauhati High Court in the case of Sajjan Bagaria (113 ITR 430). That was a case where certain capital had been earned by a firm and one of the partners claimed certain expenditure for the purposes of deduction. It was held that the partner was entitled to claim deduction for the amount which he had spent for acquiring the interest in the house property from which the capital gain had arisen. We, however, find that the said decision was entirely on a different question and, therefore, does not help the assessee in respect of the proposition that the amount of capital gain was not liable to be again assessed in the hands of the partners. On the other hand, it appears from the said decision that the amount of capital gain was liable to be taxed in the hands of the partners. Our attention has next been drawn to a decision of the Punjab and Haryana High Court in the case of Pearl Woollen Mills (123 ITR 658). That was a case where the assessee-firm made some capital gain on the sale of spindles. It was held that the firm had no legal existence and the partnership property vested in all the partners. During the subsistence of partnership, no partner can, however, deal with any portion of the property as his own nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profit, if any, as fell to his share from time to time. It was held that the assessee-firm was liable to tax in respect of capital gains. As regards assessability in the hands of the partners, it was held that the profits/ gains could not be taxed in the hands of the firm as well as in the hands of the partners. The ld. counsel has contended that the said decision squarely applied to the present case and, therefore, the assessee's alternate plea must be accepted. Reliance is also placed on another decision of the jurisdictional High Court in the case of *Vipin Kumar* (203 ITR 941) for the proposition that a partner was entitled to exemption u/s 5(1)(iv) on the ground that the property of the firm was really the property of the partners.

14. The ld. D.R. has, on the other hand, contended that the alternate plea of the ld. counsel was not to be accepted because the amount of capital

gains stood on no different footing than a business income. If a business income was subjected to assessment in the hands of the firm, as also in the hands of the partners after division, the same principle must apply in the case of capital gains also.

15. We have considered the rival contentions and we are of the view that the capital gain was assessable in the hands of the firm inasmuch as the property was owned by the firm and also sold by it. It had been shown as its asset in the balance-sheet. The decision of the jurisdictional High Court (supra) is found to be applicable on all fours and, in that view of the matter, we hold that the amount of capital gain was liable to tax in the hand of the firm. So far as alternate plea of the ld. counsel is concerned, we again rely upon the decision of the jurisdictional High Court and following the same, we agree with the ld. counsel that the amount of capital gains could be assessed again in the hand of the partners.

16. The assessee's appeal is partly allowed with the observation that the net capital gain amounting to Rs. 35,350/- was liable to tax in the hands of the firm but not again in the hands of the partners.

(1995) 126 Taxation 37 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'B', DELHI

(Before Shri R.M. Mehta and Shri N.D. Raghavan)

ITA No. 2211 (Del.) of 1994

(Assessment Year 1989-90)

M/s R.S. Distributors

vs.

Income-tax Officer Ward No. 2, Najibabad

For the Appellant : **Bal Krishan Bhargava and R.K. Malik**

For the Respondent : **Smt. Mitali Madhusmita**

Decided on : 31-1-1995

PENALTY — Assessee filing Audit report on 21-11-1989 together with the return of income — ITO imposing penalty u/s 271B for failure to file the Audit report before the specified date which was 31-10-1989 — Held return having not been filed u/s 139(1) or 142(1)(i), penalty u/s 271B not attracted.

Income-tax Act, 1961 — Sections 139(1), 142(1) & 271B

FACTS

For the assessment year 1989-90 the assessee obtained the Audit report u/s 44AB on 14-10-1989 i.e. before the specified date viz. 31-10-1989. However, the same was filed alongwith return on 21-11-1989. Since

the Audit report was filed by the assessee beyond the specified dat the Income-tax Officer imposed a penalty of Rs. 50,720/- u/s 271B the Income-tax Act rejecting the assessee's plea that the return havin been filed u/s 139(4) penalty u/s 271B was not attracted. CIT(A) confirme the order of the ITO.

DECISION

Following Tribunal decision in *ITO vs. Mohinder Kumar* (42 ITD 385) th Hon'ble Tribunal held that after the amendment brought about by th Finance Act, 1988 w.e.f. Assessment Year1989-90 the audit report wa required to be appended alongiwith the return filed u/s 139(1) or filed response to a notice under clause (i) of sub-section (1) of section 142. Sinc in this case the audit report had been obtained on 14-10-1989 i.e. befor the specified date and the return filed was neither u/s 139(1) nc u/s 142(1)(i), penalty u/s 271B was not attracted and the same was directe to be deleted. .

Cases referred to :

1. *B.C. Mohan vs. ACIT* (1993) 45 ITD 251 (Bang.) Trib.
2. *ITO vs. Mohinder Kumar* (1992) 42 ITD 385 (Del.) SMC (Trib.)

Full text of the Order is given below :

ORDER

(R. M. Mehta, A.D.)

This appeal is directed against the order passed by the Commissioner o Income-tax (Appeals) confirming thereby a penalty of Rs. 50,720/- impose on the assessee by the Income tax Officer under section 271-B of the Income tax Act.

The assessee in this case filed its return of income on 21-11-989 as agains the due date of 31st Oct., 1989. It also filed alongwith the return the audi report in the prescribed forms viz. 3CB nd 3CD. On the ground that th assessee had not complied with the provisions of section 44-AB read witl section 271-B the Income tax Officer initiated penalty proceedings unde the latter section. As per the penalty order the opportunities provided t the assessee were not availed off and in the ultimate analysis, the penalt in quetion came to be imposed by means of an order dated 26-2-199

Being aggrieved the assessee came up in appeal to the Commissioner c Income-tax (Appeals) and at which stage it was submitted that the retur was filed late because of the illness of one of the partners and an affidavi in support was also placed on the record. The further submission was t the effect that penalty could be levied only if the return was filed unde section 139(1) or in compliance to a notice under section 142(1) and no when the return was filed under section 139(4) as was the situation in th present case. The aforesaid arguments did not find favour with th

Commissioner of Income-tax (Appeals), who proceeded to confirm the penalty mainly on the ground that the assessee had failed to file the audit report within the time allowed under section 139(1) and without a reasonable cause.

We have heard both the parties and have also perused the orders passed by the tax authorities. The issue raised for our consideration is covered in favour of the assessee by numerous judgments of the Tribunal, but it would suffice if we refer to only two such decisions as under :-

(i) *B.C. Mohan vs. Asstt. CIT* (1993) (45 ITD 251) (Bang.)

(ii) *Income-tax Officer vs. Mohinder Kumar* (1992) (42 I.T.D. 385) (Del.) (SMC).

On quite identical facts the Tribunal in the aforesaid two decisions had taken a view that penalty under section 271-B could not be imposed. We find it necessary to reproduce the following observations from the judgment of the Tribunal in the case of *ITO vs. Mohinder Kumar* (supra) :

> "The penalty under section 271-B could not be sustained either in law or on the facts of the present case because the audit report dated 26-9-1989 was available with the assessee prior to the specified date i.e. 31-10-1989. This was the requirement of section 271-B read with section 44AB prior to the amendment brought about by the Finance Act, 1988 with effect from assessment year 1989-90 provided that the audit report was acquired to be appended alongwith the return to a notice under clause (i) of sub-section (1) of section 142. Under the aforesaid two situations a penalty under section 271-B was provided for any lapse. Therefore, the penalty could not be sustained in as much as the return filed by the assessee on 21-11-89 could not be treated as a return filed under section 139(1) and it was not the department case that notice under section 142(1)(i) was issued to the assessee asking him to file a return. It was only under the aforesaid two situations that a penalty under section 271-B was attracted consequent to the non-filing of an audit report. Accordingly, the order of penalty could not be sustained."

In the present case it is not disputed before us that the audit report was obtained by the assessee on 14th October, 1989 i.e. prior to the "specified date" which was 31st October, 1989. It is only the return of income which was filed late by a period of 21 days and this delay could be penalised under section 271-B.

The facts being absolutely identical in the present appeal we following the aforesaid two decisions of the Tribunal, cancel the penalty of Rs. 50,720 imposed under section 271-B.

In the result, the appeal is allowed.

SUMMARY OF APPELLATE TRIBUNAL DECISIONS

(1995) 126 Taxation 40 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B'
(Before Shri Vimal Gandhi, Judicial Member and
Shri G.D. Agrawal, Accountant Member)
IT Appeal No. 1643 (Delhi) of 1990
(Assessment Year 1987-88)

Foramer S.A. France

vs.

Dy. Commissioner of Income-tax (Assessment)

For the Appellant	:	**S.P. Puri**
For the Respondent	:	**Smt. Surabhi Sinha**
Decided on	:	30-12-1993

DOUBLE TAXATION AVOIDANCE TREATY : PROVISIONS TO OVERRIDE THE BASIC LAW OF INCOME-TAX.

Assessee, a French Company — Computing in accordance with the Double Taxation Avoidance Treaty claiming the set off of losses from one contract against the income of another contract — A.O. applying the provisions of S. 44BB taxed the Company at flat rate of 10% — CIT(A) holding the provisions of treaty to override S. 44BB but directing to restrict depreciation on straight line method only and without recourse to Income-tax Act — ITAT rejecting CIT(A)'s restriction on adopting SLM as against WDV rates provided in the Act.

Income-tax Act, 1961— Ss. 44BB & 90;

Circular 333 dated 2-4-1982;

Indo-French Double Taxation Avoidance Treaty dated 26-3-1969.

FACTS

The assessee, a French Company having the following contracts awarded by Oil & Natural Gas Commission :-

Contract dated 17th October, 1986 for carrying drilling operations in off-shore Bombay area through appellant's own rig Iled' Amsterdam (hereinafter referred for brevity sake IDA); & contract dated 24th March, 1987 for carrying on manning and management services on the Drillship Sagar Vijay owned by ONGC claimed set off of loss of IDA against the income of Sagar Vijay Contract and further claimed that the net loss which was mainly on account of depreciation amounting to Rs. 9,55,59,728 should be carried forward. The DCIT, however, held that section 44BB

is more specific than article III of the Indo-French DTAT and thus overrides the latter. He thus applied 10% net profit rate as per section 44BB of the Income-tax Act. With regard to Sagar Vijay Contract, the DCIT applied the provisions of article xvi of the treaty on Sagar Vijay Contract by treating the proceeds as fees for technical services and restricting the expenses incurred in India. On appeal the CIT(A) set aside the assessment with following directions :

(a) That section 44BB does not override article III of the Treaty for the computation of income of IDA contract.

(b) That Industrial or Commercial profits arising out of operations carried out through IDA are to be computed as per article III after deducting the expenses incurred from the gross proceeds.

(c) That depreciation being the wear and tear of the rig is an outgoing of the business and is allowable on straight line basis on accounting principle than as per the provisions of Income-tax Act.

(d) That the wear and tear of the rig and its quantification is to be arrived at with reference to its cost, its age, the nature of asset, the condition in which it is used, its maintenance with the age factor being predominant. The wear and tear in each year of the use outside India should be deducted in arising at the actual state of the rig before its use in India.

(e) That straight line method of determination of depreciation to be adopted without recourse to the provisions of Income-tax Act.

The assessee being still aggrieved claimed that the depreciation, while computing income from IDA contract under the treaty, be allowed as per provisions of the Income-tax Act.

DECISION

The Assessing Officer or CIT(A) in their orders, or learned D.R. during the course of hearing of appeal, could not bring to notice any provision in the Treaty defining WDV or providing any method for computation of depreciation. On the other hand, sub-article (2) of article II clearly provides that terms not defined in the agreement would have the meaning which these should have under the law in the Contracting State. Here, "Contracting State" is India and relevant law is Income-tax Act, 1961. Thus there is no scope but to refer to the Indian Income-tax Act, 1961 for adopting written down value and rates at which depreciation should be allowed. Sub-article (3) of Article III further provided that while determining commercial profits, all reasonable deductions are to be allowed. It is difficult to content that provisions relating to allowance of depreciation under the Indian Income-tax Act for computing business income do not relate to reasonable deduction. The Circular No. 333 dated 2-4-1982 of CBDT and decision of Hon'ble Calcutta High Court in the case of *Davy Ashmore India Ltd.* 90 ITR 626

also enjoin that basic law i.e. Income-tax Act will govern the taxation of income where there is no specific provision in the agreement governing the situation. Thus, even when commercial profits are determined with reference to Treaty, the depreciation is to be computed and allowed under the Income-tax Act. The aforesaid conclusion is further strengthened by provision of sub-sec. (2) to section 90 of the Act relating to double taxation avoidance treaties inserted by the Finance (No. 2) Act, 1991 with effect from 1-4-1972. The said sub-section provides as under :-

> "Where the Central Government has entered into an agreement with the Government of any country outside India under sub-sec. (1) for granting relief of tax, or as the case may be, avoidance of total taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

In the result, assessee's appeal is allowed in terms stated above.

(1995) 126 Taxation 42 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH

(Before Shri J. Kathuria, Accountant Member and
Shri N.K. Agrawal, Judicial Member)

IT Appeal Nos. 299 & 1169 (Chandi) 1989
(Assessment Year 1982-83)

Sh. S.K. Singh Kaintal

vs.

Income-tax Officer

For the Appellant	:	**D.S. Gupta**
For the Respondent	:	**D.V. Arora**
Decided on	:	10-5-1994

PENALTY FOR CONCEALMENT : WHERE THE ADDITION TO INCOME WAS SUSTAINED DUE TO LACK OF SUFFICIENT EVIDENCE ONLY HELD NOT TO BE A CASE OF POSITIVE AND DELIBERATE CONCEALMENT.

Assessee filing return of income — Enhanced substantially in assessment — One of the major additions related to a credit in savings bank account which was partly reduced by the Tribunal in quantum appeal — Held, that alone could not be treated to be sufficient to hold that the assessee made any deliberate attempt to conceal particulars of income — S. 271(1)(c) of the Income-tax Act, 1961.

A.O. also leving penalty u/s 273(1)(b) — Assessee submitting that since last year's income was below the prescribed limit of

Rs. 15,000/-, therefore no advance tax was payable — Assessed income being much above the taxable limit — CIT(A) confirming penalty @ 20% — ITAT on facts reducing the same to 10%.

Income-tax Act, 1961 — S. 273(1)(b).

FACTS

The assessee returned income at Rs. 3,785/- from business and agricultural income at Rs. 24,000/-. The Assessing Officer made certain additions and the assessment was formed at Rs. 2,63,320/-. Penalty notice was issued. One addition which was made by the A.O. related to the profits earned by the assessee on the sale of plots at Rs. 28,656/ -. Another addition was made at Rs. 24,144/- as profits earned from sale of plots in the name of the assessee's wife. Third addition was made at Rs. 1,17,067/-. The assessee's second appeal before the Tribunal was partly allowed.

The AO imposed penalty @ 20% of tax u/s 273(1)(b). Total penalty imposed was Rs. 1,13,450/-. It was noted by the A.O. in penalty proceedings that the tax payable on assessed income was Rs. 1,48,271/- as against which the assessee paid advance-tax at Rs. 6,000/- only. No statement of advance-tax was submitted by the assessee. Total income was ultimately found to be much above the taxable limit. CIT(A) accepted the assessee's plea that the total income in the earlier year was below the prescribed limit of Rs. 15,000/- and, therefore, no advance-tax was payable in this year. That is said to be a valid ground for not paying advance-tax. The CIT(A) sustained the penalty at 20% of the tax.

DECISION

As regards profits earned on the sale of plots, the issue had been remanded back to the A.O. for determining the cost of land purchased by the assessee. So far as additions of Rs. 28,656/- and Rs. 24,144/- are concerned, the matter stood remitted back and, therefore, no penalty could be levied on these two amounts. As regards the third addition made at Rs. 1,17,067 though the addition has been partly sustained at Rs. 72,000/- by the Tribunal, that alone could not be treated to be sufficient to hold that the assessee made any deliberate attempt to conceal particulars of income. Savings bank account did show the deposits and it is only on an examination of those deposits that the assessee was required to furnish proof of the source of that money. The assessee's explanation was not accepted but that would not mean that the assessee made any deliberate attempt towards concealment of particulars of income. In the absence of sufficient proof, the explanation of assessee came to be rejected. That alone would not establish that there was any positive or deliberate concealment. In these circumstances, mere sustaining of addition on the basis of entries in the savings bank account would not warrant a conclusion that the assessee did conceal certain particulars of income. It was lack of sufficient evidence for which the addition was sustained in part. In the circumstanaces of the case, penalty cannot be sustained u/s 271(1)(c) in the absence of any positive and deliberate concealment made by the assessee. Therefore, the penalty is deleted.

The assessee's explanation was not accepted for want of sufficient proof. Therefore, the appeal is partly allowed and the A.O. is directed to commute the penalty at the minimum leviable i.e. at 10%.

(1995) 126 Taxation 44 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
BOMBAY BENCH 'E'

(Before Shri P.J. Gordia, Accountant Member and
Shri M.K. Chaturvedi, Judicial Member)

IT Appeal No. 6780 (Bom.) of 1989
(Assessment Year 1987-88)

P.L. Chaudhari
vs.
Income-tax Officer

For the Appellant	:	**P.L. Chaudhari**
For the Respondent	:	**S.K. Jha**
Decided on	:	26-7-1994

CAPITAL GAINS : REPUTATION OF A CHARTERED ACCOUNTANT WHICH FACILITATED THE TRANSFER OF HIS CLIENTS TO ANOTHER C.A. HELD TO BE CREATED AS SELF GENERATED ASSET AND THUS OUTSIDE THE PURVIEW OF CAPITAL GAIN.

Assessee, a practising Chartered Accountant under the name of M/s P.L.C. — Transferring his clientele to another practising C.A. under the name of C.R.B. due to old age — CRB paying Rs. 2.01 lacs to M/s PLC as a consideration towards such transfer — Assessee claiming it to be exempt from capital gains as it was for goodwill which is a self generated asset —Revenue taxing the same holding it not to be a case of goodwill as the practice was not sold alongwith the name — Held, the 'reputation' of the assessee only, facilitated such transfer of clientele from one C.A. to another and the same was a self generated asset beyond the ken of Capital Gain Tax.

Income-tax Act, 1961.

FACTS

Due to old age, the asscssee, a C.A. decided to transfer his practice to one M/s C.R.B for a consideration of Rs. 2,01,000 with effect from 1-2-1986. As per letter issued by the Institute of Chartered Accountants of India dated 14th April, 1987, certificate of practice was cancelled with effect from 1st April, 1987. The assessee issued a letter dated 1-2-1986 to his clients. It was vehemently contended that the assessee manifested his intention to transfer the goodwill of the firm in the letter by his conduct, but on certain technical grounds, the consideration received on transfer was subjected to tax. It was argued that the amount was received by the assessee for relinquishing certain rights for which

the acquisition cost was 'nil'. Therefore, the case of the assessee falls within the ambit of the ratio laid down by the Apex Court, in the case of CIT vs. B.C. Srinivasa Setty (1981) 128 ITR 294 (SC).

DECISION

"Goodwill" may be taken in the words of Lord Eldon in *Cruttwel vs. Lye* 17 ves. 335, as the probability that the old customers will resort to the old place. In the instant case, it was found that old customers of the assessee were advised to go to a place recommended by the assessee. If an assessee sells his practice alongwith the name, it is treated as transfer of goodwill. In the instant case, the assessee transferred his practice. The transferee was a Chartered Accountant.. He was carrying on his practice. He took over the practice of the assessee for a consideration of Rs. 2,01,000/- .. The transfer took place subject to the terms specified in the letter dated 1-2-1986. It was specified in the said letter that the practice of M/s PLC, C.A. will be taken over by M/s C.R.B. with effect from 1-2-1986. Shri P.L.C. will not undertake any work in his personal capacity on or after 1-2-1986. However, he will continue with a certificate of practice granted by the Institute of Chartered Accountant of India, New Delhi. It was explained at the time of hearing that continuation of practice for sometime was only to facilitate the transfer. The certificate of practice was retained only for that purpose. As soon as the purpose got fulfilled, the certificate of practice was surrendered. It was also submitted by the assessee that after the transfer of practice the assessee did not earn anything from practice save and except the old outstanding dues, a list of which was furnished. Having regard to the facts and circumstances of the case it was held that the assessee received Rs. 2,01,000/- on account of the reputation which facilitated the transfer of clients from one firm to another. The 'reputation' which facilitated the transfer of files was created during the course of profession which assessee carried for 28 years. No cost of acquisition was paid for the same. It was self generated. In view of the decision of the Apex Court in the case of *B.C. Srinivasa Setty* (supra) the amount of consideration received on transfer is beyond the ken of capital gains tax.

(1995) 126 Taxation 45 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'D'

(Before Shri R.M. Mehta, Accountant Member and Shri M.A. Bakhshi, Judicial Member)

IT Appeal No. 2216 (Delhi) of 1990

(Assessment Year 1988-89)

Assistant Commissioner of Income-tax

vs.

Takshila Handloom Industries

For the Appellant : **S.C. Gupta**

Decided on : 24-10-1994

FIRM : THE SHARES OF THE PARTNERS TO BE ALLOCATED WITHOUT ADDING BACK DEDUCTION ALLOWED TO THE FIRM U/S 32AB.

Assessee a firm making a claim u/s 32AB — A.O. allowing the same but adding it back for allocating partner's share incomes — DCIT(A) directing the A.O. not to include the deduction allowed to the firm while making the share allocation — DCIT(A)'s view upheld

Income-tax Act, 1961 — Sections 32AB & 182.

FACTS

The assessee had made a claim under section 32AB which was allowed by the Assessing Officer in computing income of the firm. This deduction, however, was added back for the purpose of apportionment of shares amongst the partners. The Deputy Commissioner (Appeals) relying upon a decision of the Commissioner of Income-tax (Appeals), Karnal, in the case of M/s Life International, Karnal allowed the appeal of the assessee and directed the Assessing Officer not to include the deduction allowed to the firm under section 32AB while making the share allocation.

DECISION

Once the income of the firm is assessed, the share income has got to be allocated in accordance with section 182. The question of double deduction under section 32AB would arise in the cases of partners of the firm and not in the case of the firm itself. As far as the firm is concerned, it is not disputed that the deduction under section 32AB is permissible. When income of the firm is determined under section 143(3) or 144 the share has to be allocated amongst the partners under section 182 and thereafter, if deduction is claimed by the partner under section 32AB, such deduction is prohibited as the similar deduction has been allowed in the case of the firm. The proviso inserted by the Finance Act of 1987, is to prevent double deduction, once in the hands of the firm and then again in the hands of the partners. This could be possible but for the proviso if the ratio of the Supreme Court in the case of *CIT vs. Ramniklal Kothari* (1969) 74 ITR 57 is taken into consideration. In the said case, their Lordships of the Supreme Court have held that the business carried on by the firm is also business carried on by the partners. The partners as such could claim deduction under section 32AB by making a deposit in IDBI in respect of share income of the firm. This has been prohibited by the proviso to section 32AB. Held, the Assessing Officer having acted in contravention of provisions of section 182, the Deputy Commissioner (Appeals) was justified in reversing his order and directing to allocate the income of the firm amongst the partners without adding back deduction allowed to the firm under section 32AB.

(1995) 126 Taxation 47 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C'
(Before Shri Vimal Gandhi, Judicial Member
and Shri R.M. Mehta, Accountant Member)
Misc. Appeal Nos. 84 & 85 (Delhi) of 1994
In WT Appeal Nos. 1473 & 1474 (Delhi) of 1989
(Assessment Year 1984-85)

Deputy Commissioner of Wealth-tax
vs.
Sanjay Singh Sandhu

For the Appellant	:	**S.C. Gupta**
For the Respondent	:	**P.N. Mehta**
Decided on	:	27-10-1994

RECTIFICATION : ITAT'S DECISION HELD TO BE RECTIFIABLE, WHERE THE SAME WAS BASED, ON A HIGH COURT JUDGMENT WHICH LATER ON CAME TO BE OVERRULED BY HON'BLE SUPREME COURT.

Revenue pointing out an error apparent from the records in the orders passed by the ITAT — Contending that the orders of ITAT were based on a decision of Hon'ble Delhi High Court which subsequently came to be overruled by the Hon'ble Supreme Court — Held, the revenue's contention required to be accepted.

Income-tax Act, 1961 —Sections 154 & 254(2).

FACTS

Revenue sought to point out an error apparent from the record in the orders passed by the Tribunal contending in the process that the orders of the Tribunal were based on the decision of the Hon'ble Delhi High Court in the case of Sharbati Devi Jhalani vs. CWT (1986) 159 ITR 549 which decision subsequently came to be over-ruled by the Hon'ble Supreme Court in the case of Bharat Hari Singhania vs. CWT (1994) 207 ITR. It was submitted that an order which was a good order at the time when it was passed may subsequently reveal a mistake apparent from the record in the light of a subsequent Supreme Court decision and the authorities which passed the earlier order were duty-bound to rectify the same so as to eliminate the said error. It was further submitted that the law laid down by the Hon'ble Supreme Court was not a declaration of law from the date of the judgment of the Supreme Court but the law as it ought to have been all along from the date on which a particular provision was brought on the statute book.

DECISION

The Tribunal has accepted similar submissions on the part of the Department in the case of *Shashi Raj Kapoor* (1987) 21 ITD 406 (Bom.) accepting the miscellaneous application filed by them consequent to a Supreme Court

decision delivered after the judgment of the Special Bench of the Tribunal at Bombay taking a view to the contrary. Their Lordships of the Hon'ble Kerala High Court in the case of *Kil Kotagiri Tea & Coffee Estates Co. Ltd.* (1988) 174 ITR 579 (Ker.) observed as follows in dealing with a issue which was identical to the one under our consideration :-

> "An order of assessment based upon an interpretation or application of law which is ultimately found to be wrong in the light of judicial pronouncements rendered subsequently, discloses a mistake apparent from the record. When the court decides a matter, it does not make the law in any sense but all it does is that it interprets the law and states what the law has always been and must be understood to have been. Where an order is made by an authority on the basis of a particular decision, the reversal of such decision in further proceedings will justify a rectification of the order based on that decision."
>
> "Section 254(2) and section 154 of the Income-tax Act, 1961 enable the concerned authorities to rectify any mistake apparent from the record.' The said expression has a wider content than the expression 'error apparent on the face of the record' occurring in order 47, rule 1 of the Civil Procedure Code, 1908. The restrictions on the power of review under order 47, rule 1, do not hold good in the case of section 254(2) and section 154 of the Income-tax Act. Even for the purpose of Order 47, rule 1 of the Civil Procedure Code, 1908, which is more restrictive, a subsequent binding authority taking a different view of law is a good ground for review, on the ground that the order sought to be reviewed passed on an antecedent decision, which stands overruled, constitutes an error apparent on the face of the record."

In the light of the discussion in the preceding paras, held that the applications filed by the revenue are required to be accepted and that there is a mistake apparent from the record in the orders passed by the Tribunal vis-a-vis the decision of the Hon'ble Supreme Court in the case of *Bharat Hari Singhania* (supra) as also *Sharbati Devi Jhalani* (supra), the latter also having been disposed of by the Hon'ble Supreme Court in Civil Appeal Nos. 1591 to 1596 of 1991. As a result of the aforesaid discussion the orders passed by the Commissioner of Wealth-tax (Appeals) in both the cases are reversed.

TRIBUNAL DECISIONS

(1995) 126 Taxation 49 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH, JAIPUR
(Before Shri M.A.A. Khan and Shri Pradeep Parikh)
ITA No. 512/JP/1994
(Assessment Year 1989-90)

Shri Shyam Sunder Gupta
vs.
Income-tax Officer

For the Appellant	:	**N.M. Ranka**
For the Respondent	:	**S.P. Singh**
Decided on	:	22-12-1994

FOREIGN GIFTS — Assessee receiving 5 gifts of Rs. 5000 cash from one Shri P.K.J. in London — Filing donor's confirmation & Bank's certificate — ITO found assessee had no relationsip etc. with donor there was no occasion for such gifts — He held the gifts shown and treated assessee's own income — Held assessee failed to prove genuineness of gifts — Addition confirmed.

ADDITIONS (i) For low withdrawals ITO making addition of Rs. 11600 — Held ITO justified in estimating household expenses @ Rs. 2000 P.M. — Addition confirmed.

(ii) Assessee's wife filed return declaring income of Rs. 12,500 — ITO treating it to be assessee's income — Held 12,500 wife's income was from sale of her stock in hand — Addition deleted.

(iii) Addition of Rs. 5000/- made in assessee's hands being the income shown in the status of HUF — Held HUF had no business — Addition confirmed.

(iv) Assessee depositing Rs. 60,000 in own S/B A/c & Rs. 50000 in wife's S/B a/c — Rs. 50,000 held to be sale price of assessee's wife's stock in hand and addition deleted — Addition of Rs. 60,000 upheld.

INTEREST : Interest charged u/s 234B & 234C to be recalculated after consequential relief allowed.

FACTS

For the assessment year 1989-90 assessee filed his return declaring income from property and other sources. The ITO noted that during the year the assessee had received five gifts of Rs. 5000/- each from

one Shri Pawan Kumar Jain of London. Assessee filed his confirmation as well as Bank's certificate in that regard. ITO enquired about assessee's relationship with Shri Jain and his address in India or of his relations in this country and also the occassion for such gifts. Assessee informed Shri Jain was his friend and met him in Kathmandu for few days. No other relationship or occasion for gifts. ITO treated the sum of Rs. 25000 as assessee's income holding that the gifts were sham. Assessee's family consisted of 5 members. Total withdrawals were 7900/-. ITO estimated expenses at Rs. 2000/- P.M. and added back Rs. 16100/-.

Return of income declaring income of Rs. 12,500/- was filed in assessee's wife's name showing as profits from Malkhata, the goods of wife's business having been sold in Kathmandu for Rs. 77,500/-. ITO disbelieved this story and created Rs. 12,500/- as assessee's income. ITO also added Rs 5000/- as income of assessee which was shown in the status of assessee's HUF by the assessee.

In addition to the above the ITO noticed one deposit one Rs. 60,000 in assessee's S.B. account and Rs 50,000/- deposited in wife's S/B account. The assessee's plea of correlation of these deposits with earlier withdrawls and sale of wife's stocks in Kathmandu was rejected and the deposits were treated as assessee's income. Interest u/s 234B and 234C was also charged.

DECISION

Regarding gifts from Shri Jain the Tribunal observed that establishment of the identity and creditworthines of the giver would not necessarily establish the genuineness of the transaction. The relationship between the parties and their conduct and behavior in relation to the transaction are relevant factors in considering a transactin as genuine or otherwise. It is particularly so when the transaction was gratutous and takes place between strangers and that too at no auspicious or special occasion. The circumstances attending on the alleged transaction as also the conduct and behaviour of the parties were clearly such as went against the genuineness of the transaction. The addition was thus held to be justified. The addition on account of low withdrawals for household expenses was also confirmed as the estimate by the ITO at Rs. 2000/- P.M. for five members of the family was considered reasonable.

About Rs. 12,500/- treated as assessee's income the Hon'ble Tribunal held that assessee had sold his wife's stocks in Kathmandu for Rs 7,75,00/- as against its value of Rs. 65,000/-. This addition was thus deleted. The addition of Rs. 5000/- on account of income shown in HUF return was confirmed in assessee's hands as the Tribunal held that there was no evidence for the HUF having done any business.

In regard to the addition of Rs. 60,000/- in assessee's hands on account

of deposit in assessee's Savings Bank account, the Hon'ble Tribunal rejected the story of correlation of withdrawals and confirmed the addition made by the ITO. The addition of Rs. 50,000/- on account of deposit in wife's account was, however, deleted holding that it represented the sale proceeds of assessee's wife's stocks sold in Kathmandu. Lastly the interest charged u/s 234B and 234C was directed to be recalculated after allowing the above reliefs.

Cases referred to :

1. *Shri Meenakshi Mills Ltd. vs. CIT* 31 ITR 28 (SC)
2. *A. Govind Rajulu Mudalliar vs. CIT* 34 ITR 807 (SC)
3. *Chaturbhuj & Co. vs. CIT* 36 ITR 386 (All.)
4. *Ram Kishen Das Munnalal* 41 ITR 452 (All.)
5. *Smt. Saroj Sirselewala* ITA No. 45/JP/91
6. *Lal Chand Kalra vs. CIT* 22 CTR 135 (P&H)

Full text of the Order is given below :

ORDER

(M.A.A. Khan, JM)

The assessee is in appeal from CIT(A)'s order dated 2-2-1994 for A.Y. 1989-90 on the following points, viz.

(1) Addition of Rs. 25,000/- on account of gifts :

2. The assessee is an individual earning income from property and other sources. For A.Y. 1989-90 the assessee filed his return of income on 25-12-1989 declaring total income at Rs. 18,200/-. On examining the return and the statement of income filed alongwith the return the Assessing Officer (AO) noted that the assessee had shown to have received five gifts of Rs. 5,000/- each from the Shri Pawan Kumar Jain in London. In support of such claim the assessee had filed the photostat copy of a letter from Midland Bank PLC, London stating that a Bank draft of Rs. 15,000/- was being sent to the assessee as per instruction of the aforesaid Shri Jain. Certificate dated 8-4-1989 from State Bank of Bikaner & Jaipur, Branch Sriganganagar was further filed to show that the balance amount of Rs. 10,000/- was also received for the assessee from the said Shri Jain. The A.O. required the assessee to file confirmations of the gifts from Shri Jain and also to tell his address in India as also his relationship/intimacy with Shri Jain. Despite opportunities given to the assessee on 11-10-1991, 24-10-1991, 20-11-1991 and 26-11-1991 he could not furnish the required information and simply stated that Shri Jain had stayed with him in Kathmandu (Nepal) for a month or so and it was out of love and affection resulting from that friendship that Shri Jain had gifted the amount of Rs. 25,000/- to him. The Assessing Officer did not accept such contention

of the assessee and made an addition of Rs. 25,000/- to assessee's total income.

3. In appeal the assessee appears to have filed a confirmation in the shape of aerogramme letter from Shri Jain. After taking into account this additional evidence also the learned CIT(A) agreed with the Assessing Officer that the alleged gift was sham and actually the amount had been arranged by the assessee through some contact or middleman so as to convert his unaccounted money into accounted money by way of alleged foreign gift. In this behalf the CIT(A) relied upon Punjab & Haryana High Court decision in *Lal Chand Kalra vs. CIT*, 22-CTR-135 wherein it was held that receipt of foreign gift from totally stranger person was rightly rejected as genuine by the Tribunal.

4. Relying upon the Supreme Court decision in 87-ITR-349 Mr. N.M. Ranka, Advocate urged for the assessee that the apparent should be regarded as real and to prove the contrary was the burden of Revenue which it failed to discharge. It was further submitted that once the assessee had discharged the primary burden by producing of all possible evidence regarding the identity of the donor, his credit-worthiness and capacity to make the gift, the burden shifted to Revenue. In his turn the learned Departmental Representative supported the order of the learned CIT(A) on the point.

5. Receipt of money by a person from the other gratuitously or under an obligation to return or repay the same casts a burden on the recipient not only to prove the identity and creditworthiness of the giver but also the genuineness in the transaction. Establishment of the identity and creditworthiness of the giver would not necessarily establish the genuineness in the transaction. Genuineness in the transaction may be established by taking into account the circumstances attending on such transaction. The relationship between the parties and their conduct and behaviour in relation to the transaction are relevant factors in considering a transaction as genunine or otherwise. It is particularly so when the transaction is gratuituous and takes place between strangers and that too at no auspicious or special occasion. In such transactions a deeper probe is required to be made and the doctrine of "apparent is real" may not hold good.

6. In the instant case the receipt of Rs. 25,000/- by the assessee through bank drafts from a resident in foreign lands may establish the identity of such foreign national or resident as also his creditworthiness but the facts that the transaction was alleged to be gratuitous and had apparently taken place between two strangers could have prompted the A.O. to enquire of the assessee the whereabout of the alleged donee and his relationship with him. What the assessee could say in his affidavit and statement was that the alleged donee was his friend who had stayed with him at Kathmandu in Nepal. He could never tell his address in India. The bare assertion of an occasional stay of the alleged donor with the assessee in Nepal turning

the intimacy into friendship of the degree which prompted the donor to donate substantial amount to the assessee at no auspicious occasion, got no corroborative support not even from assessee's own affidavit which does not even state as to when and for how many days Sri Jain stayed with the assessee. The assessee cannot even tell his address and other relatives in India which a friend is normally expected to know. The circumstances attending on the alleged transaction as also the conduct and behaviour of the parties were clearly such as went against the genuineness of the transaction. In this behalf the approach adopted by the Tribunal in the case of Smt. Saroj Sirselewala for A.Y. 1985-86 (ITA No. 45/JP/91) wherein the Gift-tax Officer had charged gift-tax on the gifted amount and had thus accepted the genuineness of the gift in that case does not help assessee in the present case.

7. In the totality of the circumstances of this case we accept the concurrent finding of the Assessing Authorities that the gift was sham and the gifted amount represented assessee's own income arranged to have come to him through some contact or middleman. We accordingly dismiss this ground.

(2) Addition of Rs. 11,600/- on account of low house-hold expenses :

8. The Assessing Officer noted that the assessee and his wife had withdrawn the sum of Rs. 10,000/- and Rs. 1,500/- only respectively to meet the house-hold expenses. He further noted that the assessee had deposited Rs. 3,600/- in three R.D. A/c. in the names of his three school going children. The A.O., therefore, considered the balance amount of Rs. 7,900 as too in sufficient to meet the household expenses for a family of five persons. He, therefore, estimated such expenses @ Rs. 2000/- per month and made an addition of Rs.16,100/-. The addition was confirmed by the CIT(A) in appeal.

9. It was urged by Mr. Ranka that in computing the withdrawals for the house-hold expenses of the assessec the I.T. authorities did not consider the contribution of Rs. 10,000/- made by the mother of the assessee out of her agricultural income. In this behalf affidavit of Smt. Kesar Devi dated 3-8-1990, statement of assessee's elder brother Shri Laxminarain stated to have been recorded on 5-11-1990 and the decree passed by District Judge, Sriganganagar dated 31-7-1989 were referred to. It was also submitted that deposits in the R/D accounts of the Children were made out of the periodical gifts received by them from the members of the family and/or other relation. The learned Departmental Representative has supported the addition.

10. We find that it is not in dispute that the total withdrawals by the assessee and his wife amounted to Rs. 11,500/- only. It is also not disputed that Rs. 300/- per month were deposited in the R.D. A/cs. in the names of assessee's three children. There is no evidence on record to show the monthly receipt of that much of amount by the children by way of gifts. The position leaves a sum of Rs. 7,900/- only for house-hold expenses.

11. In so far as the contribution of Rs. 10,000/- allegedly made by the mother of the assessee to the house-hold expenses is concerned, the affidavit of the mother and the copy of the statement of elder brother, which have though been referred to in the written submissions dated 25-11-1991 before the Assessing Officer, were not brought on record. A study of the court documents placed at PP. 11 to 17 goes to show that in order to settle down their family dispute the assessee, his brother, their mother and other relations had appointed on 13-2-1987 Shri Bhagwan Dass as the Sole-arbitrator who made the award on 15-2-1987. The parties applied in the court to make the award as Rule of Court which the Court of Distt. Judge, Sriganganagar did on 10-3-1989 in civil petition No. 101 of 1987. According to the rule of the court 25 bighas of agricultural land of Square No. 192/60 in Chak 19 KND was to remain the property of Shri Dinesh Kumar. Smt. Kesar Devi, the aged mother of the assessee appears not to have felt satisfied with this arrangement. She, therefore, filed civil petition No. 76 of 1989 before the District Judge, Sriganganagar who vide his decree dated 31-7-1989 passed in terms of compromise between the parties, directed that the aforesaid agricultural land shall be the property of Smt. Kesar Devi. It is thus clear that during the period ending on 31-3-1989 Smt. Kesar Devi was not in possession of any agricultural land so as to contribute Rs. 10,000/- to the house-hold expenses of the assessee. Looking to the social and financial status of the assessee the price index at the relevant time and the estimation of assessee's house-hold expenses @ Rs. 2,000 per month in the earlier year, the addition in question was quite fair and reasonable. The same is accordingly confirmed.

(3) Addition of Rs. 12,500/-

12. Smt. Kailash Devi, assessee's wife had filed her return of income for A.Y. 1989-90 on 8-1-1990 and therein she declared an income of Rs. 12,500/- as profits from Mal Khata. The case of the assessee was that Smt. Kailash Devi had been carrying on her business in readymade garments in Nepal in the business name of M/s Pashupati Readymade Emporium and since she had closed down the said business and sold the stock in hand worth Rs. 65,000/- as on 31-3-1988 for Rs. 77,500/- during the year under consideration through a broker Shri Durga Dutta Bansal, she earned that much of profits in such sales. The Assessing Officer rejected this version of the assessee on the ground that Smt. Kailash Devi had came down from Nepal in July/August, 1986 and thereafter the assessee had been visiting Kathmandu and doing all the winding affairs. He, therefore, made an addition of Rs. 12,500/- in the hands of the assessee.

13. Heard the parties.

14. It is not in dispute that the addition in question represents the profits from sale of stock in hand pertaining to the business of M/s Pashupati Readymade Emporium at Kathmandu in Nepal. It is also not in dispute that

Smt. Kailash Devi wife of the assessee had come down from Nepal in July/ August, 1986. Now it has been solemnly affirmed by S/Shri Suresh Kumar, Mahendra, Basant Kumar, Jagat Vikram Singh, all residents in Nepal and carrying on business there, in their respective affidavits that the assessee was carrying on his business in Kathmandu in the name of Shubh Labh Emporium and his wife in the name of M/s Pashupati Readymade Emporium. These affidavits have gone unrebutted. In view of this evidence the finding of the CIT(A) in assessee's case for 1988-89 that Smt. Kailash Devi carried on business in Nepal become relevant to the issue presently before us. There is no evidence to show that the capital invested in that business had gone to Smt. Kailash Devi from the assessee or that the income therefrom had come to his hands. Since the business was closed in 1986, it was not unusual on the part of the assessee to have helped his wife to dispose off the stock in hand there. The reflection of the stock in hand in the accounts of Mrs. Kailash Devi and her assessment, under Amnesty Scheme Clearly supported the view that it was her income and, therefore, the same was wrongly clubbed in assessee's hands. The addition of Rs. 12,500/-, is, therefore, deleted.

(4) Addition of Rs. 5,000/- :

15. A return of income in the status of Shyam Sunder Gupta & Sons (HUF) was filed on 29-12-1989 showing income of Rs. 12,500/-. On being asked to explain, it was told to the AO that income of Rs. 5,000/- came from business and Rs. 7,500/- from interest. The Assessing Officer observed that the HUF had never disclosed in the past any income from business. He, therefore, made an addition of Rs. 5,000/- in the hands of the assessee. In appeal the learned CIT(A) observed that during A.Y. 1988-89 certain transactions in cotton bales were carried on in the name of the HUF but at the end of the year there was no stock left with the HUF.

16. Mr. Ranka referred to the account of the HUF at pp. 38-39, the asst. order for 1988-89 at pages 53 and 73 and the appellate order at pages 61 to 64 to show that the HUF existed and carried on business. That appears to be correct but it does not demolish the finding of the learned CIT(A) that the accounts of the HUF as filed in the assessment records for 1988-89 showed no stock left with the HUF. In his order for that year CIT(A) had observed that the HUF appeared to have entered into casual transactions of purchase and sale of cotton bales. In view of this state of affairs we do not feel inclined to interfere with the order of the CIT(A) on the point and dismiss the relevant ground.

(5) Additions of Rs. 60,000/- & Rs. 50,000/- :

16. The Assessing Officer noted that the assessee had deposited on 28-3-1989 a sum of Rs. 60,000/- in cash in his Saving Bank A/c No. 1690 with Syndicate Bank. On being asked, the assessee explained that he has withdrawn an amount of Rs. 70,000/- from his SBBJ A/c No. 2795 on 7-10-1988 to make investments in some immovable property but since the

deal did not materialise he had to re-deposit the balance amount of Rs. 60,000/- on 28-3-1989. The reason for delay in re-depositing the amount was stated to be his visits to Kathmandu and other domestic problems. The Assessing Officer did not accept the explanation and made an addition of Rs. 60,000/- as assessee's income from undisclosed sources.

17. The Assessing Officer had further noted that on 30-12-1988 a deposit in cash of Rs. 50,000/- was also made in the Savings Bank A/c No. 3114 with SBBJ in the name of assessee's wife Smt. Kailash Devi. The assessee explained that the source of the said deposit was the sale proceeds of the stock in hand pertaining to the business of his wife in Kathmandu. The Assessing Officer examined the evidence in that behalf and noted certain contradictions in the statements of the assessee, his wife and the broker Shri Durga Dass Bansal and rejected the version of the assessee. He accordingly treated this amount too as assessee's income from undisclosed sources and made addition accordingly.

18. In appeal the learned CIT(A) examined the issue in the point in great detail and came to the following conclusion :-

"8.6 I have considered the facts of the case, submissions of the learned counsel and perused the decisions relied upon the ld. counsel. The perusal of the pass book of assessee's account No. 2795 with the S.B.B.J. shows as under :-

Date	Mode	Withdrawal	Deposits	Balance
	B/F			10,460.40
22-09-88	Cash	—	20,000	
23-09-88	Self (Cash)	20,000	—	
27-09-88	Transfer	—	20,000 (Loan from Jai Shankar Beej Bhandar)	
27-09-88	By cash	—	40,000	
07-10-88	Withdrawal	70,000	—	
09-12-88	By Intt.	—	53.65	
26-12-88	OBC	—	5,000.00 (Gift)	
26-12-88	OBC (Cash)	17	—	
21-01-89	Cash	5,000	—	

It is noted from above that the assessee had been depositing cash and, yet, on the next day withdrawing the same (22-9-88 and 27-9-88). From the cash Rs. 20,000/- withdrawn on 23-9-88, the assessee had given Rs. 6,000/- to M/s Jai Shankar Beej Bhandar, as per the copy of account of the assessee in the books of the said party filed. How the balance

cash Rs. 14,000/- was utilised is not known. On 27-9-88, the assessee had taken a loan of Rs. 20,000/- from M/s Jai Shankar Beej Bhandar, and had also deposited Rs. 40,000/- in cash in the bank account. The source of Rs. 40,000/- deposited on 27-9-88 has been explained by the assessee's ld. counsel, vide his letter dt. 17-1-1994 to comprise of Rs. 20,000/- withdrawn on 23-9-1988 and balance Rs. 20,000 from the amounts collected from debtors in Nepal. The amount stated to have been collected from debtors in Nepal has been shown at Rs. 37,156/-. From the perusal of the assessment record of the assessee it was noticed that the said debtors were mentioned in the balance sheet of the assessee filed as on 31-3-1988 and the same did not figure in the assessee's balance sheet as on 31-3-1989. However, no evidence has been adduced to the affect as to when these debtors had paid amounts to the assessee. It needs to be mentioned, as stated above, that out of Rs. 20,000/- withdrawn on 23-8-88 Rs. 6,000/- had been given to M/s Jai Shankar Beej Bhandar. However, it has been explained that Rs. 6,000/- deposited with M/s Jai Shankar Beej Bhandar, on 23-9-88 was out of realisation of Rs. 6,000/- from a debtor Smt. Sharda Devi. But again no evidence has been adduced as to when the amount was received from Smt. Sharda Devi.

8.7 It appears rather abnormal or contrary to normal human behaviour that a person would withdraw for no reasons cash from bank on 23-9-88 and deposit the same after four days, i.e. on 27-9-88. However, it cannot be ignored that the assessee had taken a loss of Rs. 20,000 (though actually Rs. 14,000/- as Rs. 6000/- of the assessee was already lying with M/s Jai Shankar Beej Bhandar) for merely keeping the amount in cash at home as contended by the assessee because Rs. 70,000 withdrawn on 7-10-1988 include the loan amount of Rs. 20,000 as would be clear from the extract of the pass book, above. This, in itself, shows that Rs. 70,000 had been withdrawn for certain specific purposes.

8.8 In the written submissions filed vide letter dt. 22-11-1983, the ld. counsel of the assessee has taken an alternative plea or furnished an alternative explanation in regard to withdrawals and deposits in the assessee's bank account as under :-

Withdrawal SB A/c 2795 SBBJ (Assessee's) on 07-10-1988	Rs. 70,000/-
Deposit SB A/c No. 3114 SBBJ (Smt. Kailash Devi, wife's) on 31-12-1988	Rs. 50,000/-
Withdrawal -do- on 1-1-89	Rs. 48,000/-
Deposit A/c No. 1690 Syndicate Bank (Assessee's) on 28-3-89	Rs. 60,000/-

In view of above, it has been explained by the ld. counsel that the period

during the which the cash remained at home with the assessee was not more than three months at any time. In this context, it needs to be mentioned that the assessee has himself stated that the cash Rs. 20,000/- withdrawn on 22-9-1988 was redeposited on 27-9-88. This implies that the assessees was in habit of depositing cash which he did not need or did not utilise. The alternative plea, above, submitted by the ld. counsel, cannot be accepted as it is contrary to the explanation furnished in regard to source of deposit of Rs. 50,000/- in the account of Smt. Kailash Devi on 30-12-88. As already stated above, the source of this deposit had been explained to be sale realisation of the stocks lying in Kathmandu. It is evident that when the ld. Assessing Officer, in his impugned assessment order, did not believe the explanation furnished as the alleged stocks had been sold in April, 1988, and not in December, 1988, the assessee has now taken an alternative plea of explaining the source of cash Rs. 50,000/-, deposited in the account of Smt. Kailash Devi, as out of Rs. 70,000/- withdrawn on 7-10-1988. It again needs to be mentioned that during the assessment proceedings the assessee had explained that Rs. 70,000/- had been withdrawn on 7-10-1988 for making investment in certain immovable property but as the deal could not be materialised, Rs. 60,000/- out of the said cash was deposited in his Syndicate Bank on 28-3-1989. Thus, it is observed that the assessee has been changing his stand or explanation frequently whenever driven to the wall viz—viz the explanation furnished earlier. Besides, it is not the contention or claim of the assessee that he intended buying an immovable property in an auction, where the payment has to be made there and then. The assessee could withdraw from the bank as and when the deal for purchase of property, as contended, had finalised. Evidently, this is an explanation, which is an after thought. At the same time, it cannot be over-looked that in order to withdraw the amount Rs. 70,000/-, the assessee had taken loan from M/s Jai Shankar Beej Bhandar. This, in itself, shows that the assessee did need Rs. 70,000/- for meeting certain obligations, which he is not willing or inclined to disclose. The perusal of bank pass book of the assessee and his wife, Smt. Kailash Devi, showed that even in the subsequent period, i.e., after the close of the accounting period the assessee has been withdrawing in cash or by cheque immediately whenever the amounts were deposited in the bank account either by cash or cheque. Evidently, the assessee has been indulging in certain transactions or business activities, which he is not inclined to disclose or to bring on record.

8.9 In the bank account No. 3114 with SBBJ of Smt. Kailash Devi's Rs. 50,000/- was deposited in cash on 31-12-1988. However, on the very next day, i.e. 1-1-89 Rs. 48,000/- was withdrawn in cash by self cheque. It remains to be explained why cash was deposited on

31-12-1988 when it had to be withdrawn on the very next day. It is again confusing that though Rs. 48,000/- was withdrawn on 1-1-1989, yet, it has been explained that this amount was also kept in cash at home till 28-3-1989, when Rs. 60,000/- was deposited, in cash, in assessee's account no. 1690 with Syndicate Bank.

8.10 During the assessment proceedings, the assessee had taken the plea that Rs. 60,000/- deposited on 28-3-89 was out of withdrawal of Rs. 70,000/- on 7-10-1988. During the appellate proceedings, the ld. Counsel of the assessee when asked explain the source of amount Rs. 14,000/- paid in cash to M/s Jai Shankar Beej Bhandar on 15-11-88 (Balance of Rs. 20,000/- loan taken on 27-9-88), the ld. Counsel for the assessee had explained that this amount was paid out of Rs. 70,000/- withdrawn on 7-10-1988 and lying at home. The question now arises that if the alternative explanation furnished by the ld. counsel that out of Rs. 70,000/-, Rs.50,000/- was deposited on 31-12-1988 in the bank account of his wife and Rs. 60,000/- deposited in the assessee's bank account on 23-8-89 represented Rs. 48,000 withdrawn the balance amount out of Rs. 20,000/- lying out of withdrawal of Rs. 70,000/- on 7-10-1988, the said explanation of the ld. counsel of the assessee is self-defeating. The ld. Counsel had explained that Rs. 14,000/- had been paid to M/s Jai Shankar Beej Bhandar on 15-11-1988. This means that out of the balance Rs. 20,000/- of Rs. 70,000/- withdrawn on 7-10-1988, the assessee was left with only Rs. 6,000/- on 15-11-1988. Therefore, Rs. 48,000/- withdrawn on 1-1-1989 from assessee's wife's account plus the balance Rs. 6,000 aggregate to only Rs. 54,000/- and not Rs. 60,000/- deposited on 28-2-1989.

8.11 Thus, it is seen and noted that the assessee has been changing his explanations and pleas, submitted through his ld. Counsel, time and again and, yet, he has not been able to explain satisfactorily the source of Rs. 60,000/- deposited in his Syndicate Bank account on 28-3-1989 and source of Rs. 50,000/- deposited on 31-12-1988 in the bank account of his wife, Smt. Kailash Devi. In view of the unsatisfactory, contradictory and self-defeating explanation of the assessee, the explanations furnished by the assessee cannot the relied and accepted for the reasons stated above. In other words, the only conclusion can be that the source of amounts, deposited Rs. 60,000/- and Rs. 50,000, supra, is still unexplained. In view of contradictory explanations given, it cannot be accepted that the amounts Rs. 70,000/- withdrawn on 7-10-1988 were kept ideal with the assessee at home and Rs. 50,000 deposited in the bank account of Smt. Kailash Devi was from sale proceeds of alleged stock from Kathmandu. The assessee has been withdrawing money in cash from bank and utilising it without disclosing the purpose or activity in which the amounts have been utilised and

undisclosed funds or income of the assessee has been deposited in bank by taking shelter or putting forth the explanation regarding the source of deposits as earlier withdrawals. In this back-ground, the decision of the ITAT, Jaipur supra, Karnataka High Court decision, supra, relied by the ld. counsel of the assessee will not be applicable in the case of the assessee as the facts are not identical and similar. The explanation of the assessee that two deposits of Rs. 60,000/- in his bank account and Rs. 50,000/- in his wife's bank account were out of earlier withdrawals or the source explained in the case of his wife cannot be accepted and are rejected, since the assessee has failed to explain the necessity of withdrawal of Rs. 70,000/- on 7-10-1988 and subsequent one. In this context, it also needs to be mentioned that if the assessee had with him Rs. 70,000/- withdrawn on 7-10-1988, then where was the need for the assessee to withdraw from his SBBJ Bank account Rs. 5,000/- on 21-1-1989. The assessee had credit balance in SBBJ account on 9-12-1988 Rs. 51,405/- supra. On 26-12-1988 Rs. 5,000 was deposited (alleged gift) and this Rs. 5,000/- was withdrawn on 21-1-1989. This in itself shows that the assessee did not possess or have Rs. 70,000/- withdrawn on 7-10-1988 with him on 21-1-1989. Therefore, the question of depositing Rs. 50,000/- on 31-12-1988 in wife's account and Rs. 60,000/- on 28-03-1989 in his own account out of the amount withdrawn Rs. 70,000/- on 7-10-1988 does not arise.

8.12 Thus, the explanation of the assessee that the deposits of Rs. 50,000/- on 31-12-1988 in his wife's account No. 3114 with SBBJ was out of the amount Rs. 70,000/- withdrawn by him from his bank account on 7-10-1988 and the deposit of Rs. 60,000/- in his Syndicate Bank A/c on 28-3-1989 was out of either Rs. 70,000/- withdrawn on 7-10-1988 or comprised of Rs. 48,000/- withdrawn on 1-1-1989 from his wife's account and balance Rs. 12,000/- out of the balance amount of Rs. 20,000/- of 70,000/- withdrawn earlier cannot be accepted and is rejected, since the assessee failed to explain the necessity for withdrawal of Rs. 70,000/- on 7-10-1988 and alleged withdrawn of Rs. 48,000/- from his wife's account on 1-1-1989. From the self-contradicting explanations, above, furnished by the assessee or on his behalf by the ld. counsel, I have no hesitation in holding that the explanation furnished is found to be false and the false explanation is intended to cover the true state of affairs which is disclosed might be prejudicial to the assessee's interest. In these circumstances, there can be no other finding except that both the amount Rs. 50,000/- and Rs. 60,000/- deposited belong to the assessee and the source of the same has not been explained. Accordingly, I find no reason to interfere with the findings of the ld. Assessing Officer in adding the amount Rs. 60,000/- and Rs. 50,000/-, supra, as undisclosed income of the following decisions :-

(1) *Shri Meenakshi Mills Ltd. vs. CIT*, 31 ITR 28 (SC)

(2) *A. Govind Rajulu Mudalliar vs. CIT*, 34-ITR-807 (SC)

(3) *Chaturbhuj & Co. vs. CIT* 36-ITR-386 (All.)

(4) *Ram Kishan Das Munnalal vs. CIT*, 41-ITR-452 (All.)"

19. The learned CIT(A) accordingly confirmed both the additions.

20. Before us, relying upon the cases reported in 44-TTJ and 127-ITR-807, the learned counsel for the assessee vehemently urged that mere time gap between the withdrawals of Rs. 70,000/- and re-deposit of Rs. 60,000 in the account of the assessee should not have been made the basis for rejecting assessee's contention in that behalf. In this respect the ld. counsel invited our attention to the written submissions at pp. 24-27 and affidavit of the assessee himself to which there was no counter affidavit.

21. We have thougtfully considered the evidence our attention was invited to by Mr. Ranka. We are of the opinion that all these arguments loose their force when considered in the light of the facts found by the learned CIT(A) and the reasons given by him in support of his conclusions. We have considered such reasons of the ld. CIT(A) and find outselves in complete agreement with him in so far as the addition of Rs. 60,000/- on account of the deposit made in assessee's own a/c is concerned. Accordingly we confirm the addition of Rs. 60,000/-.

22. In so far as the addition of Rs. 50,000/- on account of the cash deposit in the name of Smt. Kailash Devi is concerned, though we find sufficient force in the reasons given by the ld. CIT(A) in that respect too yet we are of the opinion that in view of certain facts including our finding above in respect to addition of Rs. 12,500/- made on account of the benami income in the name of Smt. Kailash Devi, it would not be proper to approve of this addition. In this behalf we may observe that the stock in hand relating to the business of M/s Pushupati Readymade Emporium in Nepal was treated to be the property of the wife and therefore the sale proceeds thereof could have resulted in making deposit in her account particularly when she is not found to make investments elsewhere and the account in question contains transactions carried on exclusively in her hands. Under such circumstances we do not consider it proper and safe to approve of the addition of Rs. 50,000/- in the hands of the assessee. Accordingly we delete the addition of Rs. 50,000/-.

(6) Interest u/s 234B & 234C :

23. Relief claimed in respect of interest charged under section 234B and 234C being consequential, it is directed that such interest shall be re-calculated while giving effect to Tribunal's order.

24. In the result, the appeal is partly allowed.

(1995) 126 Taxation 62 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

(Before Shri Ram Swarup and H.C. Shri H.C. Shrivastava)

ITA No. 633/Nag/93

(Assessment Year 1953-54)

Central Provinces Manganese Ore Company Ltd.
vs.
Deputy Commissioner of Income-tax

For the Appellant	:	**C.J. Thakar and D.K.Tiwari**
For the Respondent	:	**R.K. Sinha**
Decided on	:	19-5-1994

ASSESSMENT — Assessee a non-resident Co. at Nagpur with H.O. in London — During assessments Co. producing always books maintained at Nagpur with Balance Sheet & P&L a/c from H.O. at London — Customs authorities found assessee declaring lower prices than the market rate for Manganese Ore exported — Under valuation determined at Rs. 44.7 lakhs u/s 30(b) of Sea Customs Act — In 1970 revenue issuing notice u/s 148 — Notice challenged — Finally Supreme Court holding it valid — In 1992 assessment completed & addition of Rs. 44.70 lakhs made — CIT(A) confirmed assessment — Held no evidence that sales made below market price were sham transactions or market price was in fact paid by the purchaser — Goods sold at concessional rates cannot entitle the Deptt. to assess the difference between market price & prices paid by purchaser as profit — Addition deleted.

Income-tax Act, 1961 — Sections 145 & 148.

Sea Customs Act — Sections 30(b).

FACTS

The assessee is a non-resident Co. with office at Nagpur and Head Office in London. It had been the practice of the Co. to produce before the ITO the relevant books maintained at Nagpur and the Trading, P&L a/c and Balance Sheet from their Head Office in London. Never the books of account of the Head Office were produced for Income-tax assessment purposes. In 1958 customs authorities came to know that for three buyers the value shown by the assessee of Manganese Ore exported was lower as compared with the prevailing market price for the grade of Manganese Ore so exported. The customs authorities determined finally such under-valuation at Rs. 44.7 lakhs and completed the assessment u/s 30(b) of the Sea Customs Act. Consequent upon this information, the Income-tax Department also reopened the assessment of the assessee Co. by issuing a notice u/s 148 of the Act. The assessee

challenged this notice and finally the Hon'ble Supreme Court upheld its validity. The reassessment for this year was thus completed in 1992 and the revenue added back the sum of Rs. 44.70 lakhs being the difference between the value declared under the agreement and the reassessed value by the Customs Department. The assessee's arguments that it was not a real income and was only a notional figure and that books and documents of H.O. of such an old period were not available at this stage were rejected by the Assessing Officer and also the CIT(A) in first appeal. The assessee filed a second appeal.

DECISION

The Hon'ble Tribunal observed that on facts the non-production of books before the lower authorities was not deliberate. The assessee could not produce them and the original copies of contracts because of long lapse of time. There was no evidence to show either that the sales made below a market price were sham transactions or that the market prices were in fact paid by the purchaser, the mere fact that the goods were sold at concessional rates would not entitle the Department to assess the difference between the market price and the prices paid by the purchaser as profit of the assessee. There was no material to hold that the difference between the duty assessed by the Customs Department u/s 30(b) of the Sea Customs Act and the contract price shown by the assessee in the contracts resulted in any additional income liable to Income-tax. There was no reason to hold that such an under-invoicing was deliberate or intentional and resulted in additional income. In the circumstances the Hon'ble Tribunal deleted the addition made by the Revenue.

Cases referred to :

1. *CIT vs. A. Raman & Co.* 67 ITR 11
2. *Marghabhai Kishabhai Patel & Co. vs. CIT* 108 ITR 54
3. *Central Provinces Manganese Ore Co. Ltd. vs. CIT* 191 ITR 662 (SC)

Full text of the Order is given below :

ORDER

(H.C. Shrivastava, A.M.)

The facts of this case are as under :

1. The assessee-appellant is a non-resident company having its Head Office in London.

2. It has its Office in India at Nagpur and is passessed to tax also under the charge of CIT, Vidarbha, Nagpur.

3. It has been the practice of the assessee company to produce before the Income-tax Officer the relevant books which are kept by the local office at Nagpur, balance sheet, the trading account and the profit and loss account

from their Head Office in London. No books of accounts from the Head Office were ever produced during any Income-tax proceedings.

4. Some time in 1958 the Customs authorities came to know that the assessee had declared lower prices than the market rate in respect of all the consignment of Manganese Ore exported by them out of India.

5. These exports were made only to the three buyers who did not purchase Manganese Ore from any company other than the assessee. The Customs authorities found that the value shown by the assessee for manganese ore exported was lower as compared with the prevailing market price for the grade of Maganese Ore so exported.

6. The Collector, Customs, Visakhapatnam by his order dated 2-3-1989 held as below :-

> "In accordance with your endorsement on the reverse of the above Shipping Bill, the Customs duty leviable in respect of the above mentioned consignment was assessed provisionally on the basis of the value declared by you and shipment was allowed accordingly.
>
> 2. The question of assessment has now been finalised and it has been found that the correct price as prevailing at the time of delivery of the above Shipping Bill was Rs. 170/- per ton ex-duty on the basis of 48% Manganese content.
>
> 3. Adopting the declared Manganese content of 49.25% in respect of 3,500 tons and destination analysis of 52.91% in respect of 1,500 tons (as determined by Messrs. Booth, Carrett and Blair) the correct assessable value works out to Rs. 8,91,390/- the amount for duty leviable thereon being Rs. 1,33,738.50.
>
> 4. Pending final assessment, a sum of Rs. 1,07,891.19 was paid by you provisionally on account of Customs duty while the sum of Rs. 18,554.25 was subsequently refunded in consequence of short-shipment. An amount of Rs. 44,401.56 is therefore found to have been short levied, payment of which may kindly be made at an early date.
>
> 5. The details of the final assessment are given below :

Yours faithfully,

Sd/-

Collector of Customs.

Detials of final Assessment :

1.	Quantity actually shipped :	3500 and 1,500 tons
2.	Correct price prevailing at the time of shipment —	Rs. 170/- per ton (ex duty) basis 48Mns.

3.	Manganese content adopted	49.25% of 3,500 tons. 52.91% for 1,500 tons
4.	Price applicable to the above shipping bill	Rs. 174.43 per ton of 49.25% Rs. 187.39 per ton of 52.91%
5.	Assessable value	Rs. 8,91,590.00
6.	Duty leviable	Rs. 1,33,738.50
7.	Duty already paid	Rs. 1,07,891.19
8.	Refund of short shipment	Rs. 18,554.25
9.	Difference of duty to be recovered. Rs. 44,401.56."	

(Rupees forty four thousand and four hundred one and paye paise fifty six only).

7. Similar order was passed with regard to a further shipment of 9000 tons by another ship. This is available on page 43 of the assessee's paper book.

8. The Collector, Customs, Madras dismissed the appeal of the assessee by observing that the assessment was made u/s 30(b) of the Sea Customs Act.

9. When the matter was taken to the Govt. of India under a revision petition, the Government set aside the order of the lower authorities on the ground that the assessee was not allowed reasonable opportunity of being heard.

10. When the matter was sent back to the Asstt. Collector of Customs, again a fresh assessment was made on 16-11-72 whereby the under-valuation that is to say the difference between the contemporaneous price and the price shown in the contract deed which was earlier fixed at Rs. 70 lakhs was now, determined at Rs. 44.7 lakhs. The assessee did not appeal against the same. It is also notable that this assessment was made by applying the provisions of section 30(b) of the Sea Customs Act. No penalty proceedings of any nature were initiated by the Customs authorities in the reassessment proceedings.

11. However, during the pendancy of this proceeding that is to say between the order of the Govt. of India setting aside the assessment of the Asstt. Collector of Customs, Visakhapatnam and the fresh order of Asstt. Collector of Customs on 16-11-72 the Income-tax Department came to know about such proceedings and initiated reassessment proceedings by issue of a notice dated 20th of March, 1970 u/s 148 of the Act. The assessee challenged the said notice by a writ petition before the Hon'ble High Court of Bombay who dismissed the same. When the matter was taken to the Hon'ble Supreme Court, the assessee's appeal was dismissed with the following finding by the Hon'ble Supreme Court :-

"The only question which arises for our consideration is as to whether

the two conditions required to confer jurisdiction on the Income-tax Officer under section 147(a) of the Act have been satisfied in this case. The first is that the Income-tax Officer must have reason to believe that the income chargeable to income-tax had been under-assessed and the second that such under-assessment has occurred by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the year 1953-54.

So far as the first condition is concerned, the Income-tax Officer, in his recorded reasons, has relied upon the fact as found by the Customs Authorities that the appellant had under-invoiced the goods it exported. It is no doubt correct that the said finding may not be binding upon the Income-tax authorities but it can be valid reason to believe that the chargeable income has been under-assessed. The final outcome of the proceedings is not relevant. What is relevant is the existence of reasons to make the Income-tax Officer believe that there has been under-assessment of the assessee's income for a particular year. We are satisfied that the first condition to invoke the jurisdiction of the Income-tax Officer under section 147(a) of the Act was satisfied.

As regards the second condition, the appellant did not produce the books of account kept by them at their Head Office in London nor the original contracts of sale which were entered into at London with the buyers. The appellant did not produce before the Income-tax Officer any of the accounts which related to the foreign buyers. No reasons were given for the supply of Manganese Ore at a rate lower than the market rate. It is for the assessee to disclose all the primary facts before the Income-tax Officer to enable him to account for the true income of the assessee. The proven charge of under-invoicing *per se* satisfies the second condition. The appellant's assessable income has to be determined on the basis of the price received by it for the goods exported. If the true price has not been disclosed and there was under-invoicing, the logical conclusion prim facie is that there has been failure on the part of the appellant to disclose fully and truly all material facts before the Income-tax Officer. We are, therefore, satisfied that both the conditions required to attract the provisions of section 147(a) have been complied with in this case."

The decision of the Hon'ble Supreme Court is reported in (1991) 191-ITR-662 particularly pages 666 and 667.

12. It is notable that in the original assessment proceedings for this assessment year 1953-54, para 2 of the order of the then Income-tax Officer, Special Circle—I, Nagpur the following observation was made :-

"Profit & Loss account along with the balance-sheet. Director's report and various explanations and statements were duly furnished."

13. The reassessment proceedings were initiated immediately after the

decision of the Supreme Court in 147 proceedings and the Dy. Commissioner, Special Range by his order dated 24-7-1992 added back the sum of Rs. 44,70,000/- which was in fact the difference between value declared by the assessee and under the agreement and the reassessed value by the Customs Department. Para 7 of the Assessing Officer's reassessment order reads as under :-

"7. A perusal of letters dated 9-7-1992 and 22-7-1992 filed by the authorised representatives during assessment proceedings shows that their basic argument is that merely because the Customs authorities have levied additional customs duty by taking under-invoicing to the extent of Rs. 44,00,000/-, the Assessing Officer under the Income-tax Act, cannot add the same as income unless it is established that this amount was actually received by the assessee or it is proved that the contracts for export are genuine. It was their argument that basis for arriving at this quantum of under-invoicing was merely the invoking of a deeming provision under the Customs Act, not relevant for Income-tax proceedings.

The above reasoning and line of argument does not hold good for the following reasons :-

The basis of the order passed by the Asstt. Collector of Customs of 16/11/1972 is not irrelevant for Income-tax proceedings.

Contrary to the interpretation of the authorised representatives section 30(b) of the Customs Act appears to be a section where the statute has tried to provide for a provision to which recourse can be taken in case it is proved that there is a discrepancy between the prevailing market value of a commodity and the value recorded in the books of the assessee. In doing so, it will be seen from the order of the Asstt. Collector of Customs, that the difference has been worked out scientifically and completely backed by facts. A copy of the said order along with its Annexure is being made part of this order as Annexure 'Z'. 158 shipping bills of the assessee company have been investigated and compared with those of other exporters of manganese ore of the same quality during the same period. The calculations of the customs authorities, being therefore completely rational can very well be made the basis for additions under the Income-tax Act. Once certain facts are established by a Government agency, there is no bar on using the same in Income-tax proceedings and no further evidence needs to be gathered independently by the A.O. functioning under the Income-tax Act in order to arrive at the conclusion that there has, in fact, been under invoicing to extent of Rs. 44.7 lakhs and adding this amount to the declared income. The Customs authorities have not determined additional customs duty to this extent but difference in value of exports to this extent."

14. When the matter was taken to the CIT (Appeals) he observed in para 9 of his order as below :-

"The Supreme Court in its order referred to above had clearly given a finding that there was failure on the part of the assessee to disclose fully and truly material facts necessary for assessment of income by not producing the accounts maintained at the head office in London and the original contracts with the buyers. The same state of affairs persists even at this stage. There is no sale agreement on record bearing the signature of the buyers. The fact of under-involving of some of the exports to the extent of the disputed amount stands concluded by the order of the Customs authorities. In the words of the Supreme Court the under-invoicing was a "proven fact".

Further, in the said para the CIT (Appeals) observed :-

"In other words, the appellant is found to have often accounted for the sale at loss than even the contracted price without being able to explain the difference with supporting evidence. I am, therefore, of the view, the Revenue was not obliged to accept the book results in this case, when as held by the Supreme Court, under-invoicing by the assessee was a "proven fact". The Assessing Officer cannot legitimately be denied the right to examine the original accounts and other documents and be forced to accept whatever the auditors or for that matter the Directors of the Company had certified to be true or correct. It was precisely for these reasons that non-examination of the same at the original assessment stage was considered by the Supreme Court to be of significance justifying reopening of the assessment. It will, in some manner, amount to skirting around the decision of the Supreme Court if the grievance of the Department that the appellant failed to produce the accounts and the original sales contracts even at the reassessment stage is given a go-by."

He further repelled the contentions of the assessee that the books of account were deliberately not produced before the Assessing Officer or before him. In para 9.3 of his order the CIT (Appeals) observed as below :-

"The contention of the learned counsels that the difference in price determined by the Customs authorities represented only a notional value and the same could not be adopted in the Income-tax assessment is well taken though irrelevant in the circumstances of the present case. If the appellant had been able to produce its books of accounts and other supporting documents including the sales contracts thus helping the scrutiny of the transactions, it would have been possible for it to argue that unless the Income-tax authorities found positive anomalies from such scrutiny, the book results could not be rejected in favour of a notional sale value. But the appellant having failed in that respect, the argument will not lie in this case. The department could justifiably proceed to determine the correct income of the appellant by applying reasonable and fair standards, by resort to the provisions of section

145(2) of the Act. The price or value found reasonable by the Customs department provided that standard. The Assessing Officer cannot be faulted for having adopted the same."

The CIT(Appeals), therefore, upheld the order of the Assessing Officer. The assessee is in appeal before us.

2. The counsel for the assessee submitted that the value adopted by the Customs Department was only a notional value in terms of section 30(b) of the Sea Customs Act which was relevant only for charging the customs duty. The relevant portion of the said section is on page 152 of the paper book which reads as below :

"Real value defined — For the purpose of this Act the real value shall be deemed to be -

(a) the wholesale cash price, less trade discount for which goods of the like kind and quality are sold, at the time & place of importation or exportation, as the case may be, without any abatement or deduction whatever except (in the case of goods imported) of the amount of the duties payable on the importation thereof; or

(b) where such price is not ascertainable the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid."

The counsel for the assessee submitted that the prices were governed by many factors, for example, standing of the customer, quality, quantity etc. The prices did not depend on the Manganese Ore alone but also on the proportion of other ingredient, for example, phosphorous, iron, silica etc. It was submitted that neither the customs authorities nor the Income-tax authorities have been able to prove that the sale proceeds received by the assessee in fact were lower than what it in fact received. It was submitted that the world demand in normal times, demand in a particular factory, availability of source of supply, chemical constituents of the ore, size of the ore, the quantity sold and whether it was for a speculation or for hedging are several factors which should be considered before any comparison can be made between the contract price shown and the market price. It was submitted that during the hearing before the CIT (Appeals) the assessee was asked to furnish :

(i) Original contracts entered into with the three foreign buyers ;

(ii) Audited profit and loss account and balance sheet for the relevant year duly certified by the Chartered Accountants along with the printed reports; and

(iii) Confirmation from the foreign buyers that there were no contracts other that those already furnished affecting the price stipulated for the relevant period.

It was submitted that the local Director of the assessee company Shri Puranik wrote to the Executive Director of the assessee company at London on 16-10-1992 reques:.ng him to supply the above referred information. The Executive Director in London wrote back as below :

> "I have to advise you to that we are unable to locate any documents requested by you. For your information, at that time, this company was a public quoted company,and after the company assigned private status in 1976, most of the old records were dispensed with. Besides, there is no obligation under local legislation to retain company's papers older than six years.
>
> As you state in your letter, you are in possession of certified copies of these documents sent to you in 1970, I suggest that you please use your good offices to convince the authorities in India to accept those documents as valid evidence."

In affidavit was filed before the CIT(Appeals) by local Director Shri Puranik. He affirmed the following :-

(1) That he was working in the Accounts Department of the Company from 1947 and from 1976 he was working as a Director and Agent and General Manager of the Company in India.

(2) He further deposed that the supplies of Ore were made under advance contracts with the buyers and the originals of the contract were kept in the Head Office of the company in London.

(3) That on demand from the Income-tax Department, copies of the contracts with the three professional foreign buyers duly certified by the then Agent and General Manager Mr. H. Dudley were furnished to the Income-tax Officer on 17-3-1970.

(4) It was further deposed that inspite of the thorugh search of the old records in London the originals of these contracts could not be found as they were about 40 years old.

(5) It was stated that the company had no more any contract with the above referred three foreign buyers ever since 1966 and it was not possible to get from them any certificate or confirmation in respect of 40 years old records.

The affidavit appears on page 113 of the paper book before the CIT(Appeals).

Xerox copies of certains sheets of cash book, journal and ledger account pertaining to the said three foreign buyers which was said to have been received by them in Head Office in January, 1976 were filed. It was submitted that all these documents were available with the assessee right from 1970 but as the High Court ~~stayed~~ proceedings u/s 147(a) the same could not be produced before the Assessing Officer. It was submitted that the profit and loss account and balance sheet duly certified by the Auditors to be in

accordance with the books of account regularly maintained by the assessee in London was filed along with the original return and the details of the sales to the foreign buyers with the quantity, unit price per tonne and the net proceeds received from them were filed before the Assessing Officer. It was also submitted that the contracts with the said three foreign buyers duly certified as true, copies by H. Dudley, Agent & General Manager of the Company were also filed before the I.I.O. in the year 1970. The counsel further proceeded to argue that the relevant extracts of the cash book, ledger, journal pertaining to the three foreign buyers which were received in 1976 were also produced. It was submitted that the assessee had been assessed for more than 50 years prior to 1952 and for more than a decade even after 1952 in respect of its Manganese Ore business and the books continued to be kept in London and were never produced before the Assessing Officer. It was submitted that there was no variation made to the book results by the Assessing Officer except making additions on account of disallowable items. The counsel proceeded to argue that no variation to the books results could be made merely on the basis of notional value fixed by the Customs Authorities u/s 30(b) of the Sea Custom Act for the purpose of customs duty. It was submitted that under the same contract certified copies of which were filed in the year 1970 the assessee had supplied more than 4,18,000 M.T. of Manganese during the year 1952 to the three parties. Attention was also invited to the fact that the Customs authorities revised the duty rate only in respect of 1,40,000 M.T. on the basis of market value prevailing at the time of shipment of the goods, while it accepted the price in respect of remaining quantity (2,78,000 M.T.) of the goods shipped under the same contract and at the same rate. It was submitted that when in 1970 the copies of the contracts were filed before the Income-tax authorities and when the Income-tax authorities ultimately relied upon such certified copies of the contract to assess the difference between the contemporaneous price and the price shown in the contract, then mere non-filing of the original contract executed 40 years before cannot be made as a ground that the relevant material for the purpose of assessment was not produced. It was submitted that the affidavit filed by the local Director (supra) which has been discussed above has not been challenged by the CIT(A). It was submitted that in view of the non-availability of the original documents, the secondary evidence, namely, the certified true copies of the contracts filed before the I.T.O. 1970 should have been relied upon both by the Assessing Officer and the CIT(Appeals). Our attention was invited to the letter of the Deputy Director of Inspection (Income-tax), New Delhi dated 10-10-1957 to the Company whereby it was observed "I can deny straightaway that there was any suggestion in my letter dated 15-9-1957 of collaboration between this company or M/s E.D. Lavine & Co. Limited with a view to in some way defrauding the Indian revenue. As I said in paragraph 12 of my letter, I did not even suggest that there was anything wrong with the accounts

anywhere and I merely wanted to be satisfied on the applicability of the provisions of section 52 of the Indian Income-tax Act. I trust that you will accept the denial and that you will find it possible to offer your co-operation by furnishing information on the specific point raised."

In the said letter dated 10-10-1957 para 11 the Dy. Director of Inspection, Income-tax observed as below :-

> "You have extended on offer that your books might be examined. I presume that the books of account and all the subsidiary accounts maintained by you are available only in the U.K. Then it will be difficult to accept the offer as it is out of question that an Officer of the Directorate should proceed to the U.K. for this purpose."

It was submitted that the Department was given an offer to examine the books but did not avail of that opportunity. It is notable that section 52 of the Income-tax Act, 1922 was concerning the false statement in declaration made under various sections of the Income-tax Act. It was submitted that the Supreme Court has clearly observed that "on the facts as found by the Customs authorities the appellant had under-invoiced the goods it exported. It is no doubt correct that the said finding may not be binding upon this Income-tax authorities but it can be a valid reason to believe that the chargeable income has been under-assessed. The final outcome of the proceedings is not relevant."

It was submitted that the decision of the Supreme Court does not mean that the Income-tax Officer and the other authorities are bound to assess the assessee on the difference between the market price as envisaged u/s 30(b) of the Sea Customs Act and the price shown in the contract as income of the assessee. It was submitted that under Income-tax Act, what is required to be seen is the real income of the assessee. The action of the Asstt. Collector of Customs only resulted in a deemed estimate of turnover resulting in collection of higher customs duty. It does not mean that there was any suppression of sales and any non-disclosure of real income earned by the assessee. He proceeded to rely upon the following decisions :

155-ITR-306, 108-ITR-54, 149-ITR-267, 113-ITR-389 and 174-ITR-370

3. The Departmental Representative submitted that it was right from 1958 that the dispute about the availability of the books started. If the assessee had any genuine concern then it should have secured the books of account from London and should have produced the same before the Assessing authorities. The assessee very well knew right from 1958 that this matter was under investigation and it should have taken all the precaution of preserving the books of account. It was submitted that the books of account were not produced, the originals of the contracts were not produced and there is no guarantee of the reliability of the secondary evidence produced

before the Income-tax authorities. It was submitted that it was established by the Customs that the assessee was under-invoicing the goods and, therefore, the normal presumption was that it in fact earned income was more than shown by it in the books of account and in any case the ITO could never be satisfied about the correctness or completeness of the accounts of the assessee and, therefore, he could make an assessment in the manner provided in section 145(2) of the Income-tax Act that is to say he could complete the assessment to the best of his judgment only.

4. In reply, the assessee's counsel reiterated his arguments and submitted that the assessee should be assessed on the real income and not on deemed income as has been done by the lower authorities. He further invited our attention to the observation of the CIT(Appeals) regarding certain discrepancies in respect of shipment of 6000 M.T. of Ores to M/s B.I.S. Ore Ltd. It was submitted that according to the CIT (Appeals) the value as per contract price was said to be Rs. 8,08,200/- and the sale price admitted to have been recorded was at a lower figure. It was submitted that the CIT(Appeals) wanted to know that in the contract unit price per ton is stated and hence he wanted to know as to how the price is calculated in terms of rupee, Pounds or Dollars. It was with a view to explain the same as example that the calculation of one transaction was submitted. It was submitted that there were mistakes in the said calculation and the revised calculation has been submitted before the Tribunal. The mistake, according to the counsel occure on account of treating the currency as 'shillings' instead of U.S. Cent's. The shipment of 6000 M.T. was not to B.I.S. Ore Ltd., London and to U.S. party and the unit price was in Centre and not in Shillings. The shipment of 6000 M.T. was in fact to U.S. Steel Corporation and the unit price as per copy of contract was 50 cent per cent unit while the contract price in respect of B.I.S. Co. Ltd. was 49.25 Shillings per unit. It was submitted that it was on account of this calculation mistake that the discrepancy arose. It was submitted that the correct calculation is available and the mistake is properly explainable.

5. We have heard the parties and we have gone through the various documents in detail. According to us the following undisputed facts emerge out of the various documents available before us :

(1) That at no given time the books of account maintained in London were ever produced before the Assessing Officer in India, for any of the assessment years.

(2) The copies of the profit and loss account and balance sheet duly certified along with the local documents available were produced before the Assessing Officer for completion of the assesssment.

(3) At no time the original of contract between the assessee and the three parties to whom the goods were exported were made available. It was for the first time in March, 1970 that the certified copies of such contracts

were available but could not be utilised as the stay was granted by the Bombay High Court against the proceedings u/s 147.

(4) The original assessment completed in March, 1954 was completed without the production of such books of account and the contracts in original.

(5) That the assessee did make an offer to the Income-tax Department to examine the books of account at London but the Department did not accept the said offer.

(6) When the proceedings u/s 147 were initiated they were upheld on the ground that the assessee had neither produced the books of account nor the original contract and the order of the Customs authorities provided sufficient material for reopening of the assessment.

(7) The original order of the Asstt. Collector of Customs, Vishakapatnam, Collector of Customs, Madras and the Central Board of Revenue and later on the order of the Asstt. Collector Customs dated 16-11-72 nowhere mention the phrase "under-invoicing". The entire order is passed on the interpretation and application of section 30(b) of the Sea Customs Act.

6. There is no denial of the fact that the Supreme Court has used the phrase "proven under invoicing". This phrase read in context with Section 30(b) of Sea Customs Act and the order of the customs authorities only means that there was a large difference between the price of the goods shown in the contracts and the market price then prevailing. Section 30(b) entitles the Customs Department to charge duty on such a difference. As observed by the CIT (Appeals) in para 9.3 of his order, there is no material or cogent evidence to establish that the actual receipts of the appellant were higher than what had been disclosed in the return. It is notable that the assessee's book results were never rejected in past. The accounts were also never rejected after this assessment year as well. It is only in this assessment year that the Department holds on the basis of the order of the Customs authorities that the assessee did not disclose his correct income. We find it difficult to accept the contention that the application of provision of section 30(b) of the Sea Customs Act can give rise to any income assessable to income-tax which is not there. It is not a case where deliberate under-invoicing has been proved. As mentioned above, the certified copy of the contract with the three foreign parties was available right from 1970. It was 21 years after such availability that the Department wanted to examine the originals of such contract. Under U.K. Law as stated by the Executive Director no such documents were required to be kept for more than six years. The issue that is for us to decide is as to when the Income-tax Department has been completing the assessments in past and in subsequent years without production of the original books of account kept at London or original contract deeds, can at later stage make an assessment u/s 145(2) by holding that in absence of books of accounts and documents it would not be possible for the Assessing Officer to accept the book results. No

doubt that there is no bar on the Income-tax Department in applying a particular provision of the Act in a particular year only. Yet this does raise certain presumption in favour of the view advocated by the assessee. This has to be read in context of the fact that neither in past nor in subsequent years, any additions were made to the total income by applying the provisions of section 13 of the 1922 Act or section 145 of the 1961 Act. It is also notable that even in 1957 the Dy. Director of Inspection, Investigation, New Delhi had turned down the assessee's offer to examine the original books at London. The Chartered Accountant who certified that the profit and loss account and balance sheet prepared and submitted by them was based on actual books of account in London is a professional person liable to explain his conduct before professional bodies and under U.K. Law as well. It is on the basis of the certified copy of the agreements and contracts which were made available in 1970 that the Department has proceeded to assess the assessee on additional income. Therefore, the Department has relied upon a document which according to it is not a primary piece of evidence. Neither the Income-tax Officer nor the CIT (Appeals) have given any finding anywhere that the certified copies of the contracts were not genuine or were not acted upon. On examination of the various statements filed before us it is seen that a correlation between the M.Ts. of exported ore, the unit price required to be paid, the name of the ship through which such goods were sent out of India can be established. The contracts though available as certified copies only can be very easily verified with the help of the goods actually exported out of India through Vishakapatnam or Bombay item by item except for very minor discrepancies. In view of the exporting documents available with the Customs authorities the validity and truthfulness of the certified copies of the contract can be established. It is not a case where any reasonable case has been made by the Department that the assessee in fact earned more amount through export and sales than what has been shown in the contract and what has been shown in the profit and loss account. The entire turnover of the profit and loss account can be correlated with the certified copies of the contracts. We do not see any reason not to accept the content of the letter of the Executive Director of the Company stating that no books were available in London and local Indian Director swearing affidavit on the basis of such a letter. The crux of the problem, however, is as to whether mere application of provisions of section 30(b) of the Sea Customs Act and the assessment by the Income-tax authorities on the difference between such an estimate and the contract price can result in any additional taxable income. The CIT (Appeals) himself says that this in itself will not result in any income. It is only by the application of provisions of section 145(2) that the book results of the assessee have to be rejected and estimate has to be made. When any Assessing Officer examines the accounts of any assessee he has to consider the following questions :-

(1) Whether the assessee has regularly employed a method of accounting?

(2) Even if regular adoption of method of accounting is there, whether the annual profits can properly be deduced from the method so employed ?

(3) Whether the accounts are correctly maintained ?

(4) Whether the accounts maintained are complete in the sense that there is no significant omission therein ?

Now if the Assessing Officer answers all the four questions in the affirmative, then the assessee's profits to be computed on the basis of his accounts. In such case neither the first proviso to section 145(1) nor section 145(2) can be invoked. If, however, the findings on questions No. 1, 3 and 4 are in affirmative but the finding of question No. 2 is in negative, the first proviso to section 145(1) comes in and the computation of income has to be made on such income and in such manner as the Assessing Officer may determine. On the other hand, if the findings on any of the questions 3 and 4 is in negative, section 145(2) applies and the Assessing Officer may make a best judgment assessment in the manner provided in section 144. Even here the books may not be disregarded altogether. However, in this case the original books were not produced at all. The assessment may be adjusted to cure the extent of infirmity found as to make it a best judgment assessment. In this case, the contention of the CIT (Appeals) is this, that as the profit and loss account and balance sheet filed by the assessee are not supported by the books of account and original terms of contract are also not available provisions of section 145(2) may be attracted, the other basis of all the evidence or books produced is not an assessment u/s 144 but is only an assessment u/s 143(3) which is to be made in the manner provided in section 144. In such a case the Assessing Officer has to give an opportunity to the assessee to contradict the materials upon which he wants to base his estimate. (102-ITR-366, particularly page 370). In this case the only material which requires to be contradicted by the assessee is the assessment order of the Asstt. Collector of Customs dated 16-11-72. It is notable that in that order itself the Asstt. Collector of Customs does not give any finding of deliberate under-invoicing. The only finding is of deemed under-invoicing on account of application of provisions of section 30(b) of the Sea Customs Act. No assessment under first proviso to section 145(1) or u/s 145(2) can be sustained if the Assessing officer or the appellate authority had not considered and recorded a finding against the assessee as to whether he has been regularly employing a method of accounting or whether his income, profits or gains can properly be deducted from his method of accounting. If he has been regularly employed a method of accounting and the accounts are correct and complete, the Assessing Officer's or CIT (Appeals)' decision on these matters is not to be presumptive or arbitrary decision but a judicial

decision and cannot be accepted if there is no material to support twice finding. In this case the only reason given by the CIT(Appeals) for applying the provisions of section 145(2) is that the original books of account were not produced either before the Assessing Officer or before him and the assessee has failed to give adequate explanation for this default. In our opinion, the Assessing Officer and the CIT (Appeals) could not ignore the past record and the subsequent year's record of the assessee. The accounts of the assessee were accepted in earlier years and in later years. That only means that the assessee had employed regular method of accounting. Except for adding disallowables, no additions to the trading results were made except in one year when the A.A.C. deleted the same and the Department did not come in appeal before the Tribunal. This means that it was possible to deduce the profit from his method of accounting. Even if it is technically conceded that the provisions of section 145(2) are applicable the fact remains that there has to be case of a real income or deemed income flowing out of this order of the Asstt. Collector, Customs dated 16-11-72. There is no material on record to prove that the assessee had any other real income then what was shown by him and except vide order of the Customs Authorities u/s 80(b) of the Sea Customs Act there is no material with the Department to prove that the under-invoicing done by the assessee in fact in result earned additional income to the assessee.

7. After going through the above facts, we are of the opinion that the non-production of the books of account before the lower authorities was not deliberate. The assessee could not produce them and the original copies of the contracts because of long lapse of time. We are also of the opinion that there is no reason to hold that the certified copies of the contracts could no the relied upon for making an assessment particularly when the Department itself has relied upon them for making an assessment. We are also of the opinion that it has nowhere been proved that the assessee earned any more income or had a large turnover than what has been shown by it in the profit and loss account. In absence of evidence to show either that the sales made below a market price were shamtransactions or that the market prices were in fact paid by the purchaser, the mere fact that the goods were sold at concessional rates would not entitle the Department to assess the difference between the market price and the prices paid by the purchaser as profit of the assessee (*CIT vs. A. Raman & Co.* 67-ITR-11 particularly page 17) and (*Marghabhai Kishabhai Patel & Co. vs. CIT* 108-ITR-54). Therefore, we are of the opinion that there is no material in this case to hold that the difference between the duty assessed by the Customs Department u/s 30(b) of the Sea Customs Act and the contract price shown by the assessee in the contracts resulted in any additional income liable to income-tax to the assessee. As mentioned above, the Supreme Court used the phrase 'proven under- invoicing' only in context with the difference between the market price prevailing as mentioned in the India-

Trade Journal and the price shown in the contract. There is no reason to hold that such an under-invoicing was deliberate or intentional and resulted in additional income. Under the circumstances, we are of the opinion that the entire addition made by the Department amounting to Rs. 44.7 lakhs should be deleted. Ordered accordingly.

8. In the result, the appeal is allowed.

(1995) 126 Taxation 78 (Bom.)

IN THE INCOME TAX APPELLATE TRIBUNAL

BOMBAY BENCH 'D'

(Before Shri T.V.K. Natarajachandran and

Shri M.K. Chaturvedi)

ITA No. 4025/Bom./90

(Assessment Year 1988-89)

Mrs. Roshan D. Nariman

vs.

Asstt. Commissioner of Income-tax

For the Appellant	:	**M. Subramanian**
For the Respondent	:	**M.N. Bajpai**
Decided on	:	19-1-1994

GIFT — Assessee a resident in India — Her cousin a residents of U.K. purchased in her name Premium Savings Bond in Jan. 1986 for £50 — Prize of £1,00,000 declared in Sept. 1987 — Her cousin declaring in Dec. 1987 that he gifting the Bond to assessee — Assessee accepting the same in London — Claiming *gift received in London not taxable— Revenue taxing the prize* money — Held the Bond being not transferable and being in the name of the assessee her cousin had no right in the same — No gift could be made by him — Prize money rightly taxed

LOTTERY — Assessee claiming prize money not lottery and prize not taxable — Held prize distribution was by chance to the winner; hence receipt from lottery and taxable.

Income-tax Act, 1961 — Sec. 115BB

Gift-tax Act, 1958 — Sec. 2(xii), 2(xiv)

FACTS

The assessee a resident in India. Her cousin Mr. K.R. Bhadha was permanently residing in England. In January 1986 the assessee was also in England. Her cousin purchased a Premium Savings Bond in the name of the assessee in Jan. 1986 for £50. A prize of £1,00,000 was declared on this Bond in September 1987. The cousin of the assessee in England

in December 1987 by virtue of an affidavit declared before the Commissioner of oaths in UK that he has gifted the above Premium Prize Bond with the prize declared to the assessee and the same was also accepted by the assessee at that time. The money was remitted to India later. The assessee claimed that the sum of Rs. 23,67,835/- being the convertiable value of prize money was not exigible to tax as the same was a gift in UK and also that it was not equivalent to lottery as envisaged in Section 115BB. The revenue rejected both these contentions and taxed the said amount. CIT (A) confirmed this order; hence the assessee filed a second appeal.

DECISION

The Hon'ble Tribunal observed that the assessee was in London in Jan. 1986 when the Bond was purchased. The address on the Bond was also the same where the assessee stayed during her visit to London. The Bond was in the name of the assessee and it was not transferable. Thus if there was any gift it was in Jan. 1986 by depositing £50 towards the prize Bond. On facts the possessor could not have claimed any title over the same. Her cousin's name was no mentioned on the certificate. Thus by holding the possession of the Bond assessee's cousin had no legal title over the same and the prize money was payable only to the assessee and not her cousin - the possesser. It was thus not possible to transfer the Bond in the name of any other person by the cousin of assessee. No one could confer a better title than what he himself had. Since the amount was received in the name of the assessee it could not have been taxed in the hands of any other person. Regarding applicability of section 115BB the Hon'ble Tribunal printed out that distribution of prize by chance would amount to lottery as contemplated u/s 115BB of the Act. The Tribunal accordingly confirmed the order of the CIT(A) and dismissed the appeal of the assessee.

Cases referred to :

1. *CGT vs. Mrs. Jer Kalvin Lubimoff* 114 ITR 90 (Bom.)
2. *CGT vs. Dr. R.B. Kamdin* 95 ITR 476 (Bom.)
3. *CGT vs. Ebrahim Haji Usuf Motawala* 122 ITR 62
4. *Gulab Rai Govind Prasad vs. CIT* 165 ITR 163

Full text of the Order is given below :

ORDER

(M.K. Chaturvedi, J.M.)

This appeal by the assessee is directed against the order of the CIT(A)-XV, Bombay and pertains to the assessment year 1988-89.

2. The short question neatly identified by Shri M. Subramanian, ld. counsel for the assessee, is whether the sum of Rs. 23,67,835/-, being the convertible value in rupees of the prize money of £1,00,000/- on Premium Savings

Bond, held in the name of the assessee, of the face value of £50, alleged to have been received as gift consequent upon the declaration of prize, is exigible to tax ?

3. Briefly the facts :- The assessee is a citizen of India and domiciled in India. For the relevant assessment year, she was a resident in India. She is following mercantile system of accounting. Her accounting period ended on 31-3-1988. In her return, she reflected share of profit received from M/s. Zorashtrian Dairy. Along with the return of income, the assessee filed inward remittance certificate number 00450 dated 23-12-1987 from Bank of India, Bombay. As per the certificate a sum of £1,00,000/- was credited by the said bank in the assessee's A/c No. 21909 in Central Bank of India on 21-12-1987. The amount was remitted by the Department of National savings, U.K. through Bank of India, London Branch.

This amount was stated to be beyond the ken of Income-tax Act. It was stated that the assessee received the Premium Savings Bond in London on 3-12-1987, as a gift from Shri Kersi R. Bhadha, her first cousin, a British citizen, who purchased it in Jan., 1986 in assessee's name. It fetched the prize in the draw held in Sept., 1987. The general conspectus of the main plank of the assessee's argument was that the prize was borne by Shri Kersi R. Bhadha and not by the assessee and, therefore, the amount was not exigible to tax in India.

4. Shri M. Subramanian, ld. counsel for the assessee, appeared before us. Relevant documents and papers were filed. It was contended that the donee's acceptance is, *since qua non*, for the completion of the gift. The Premium Savings Bond was purchased in Jan. 1986 without the knowledge of the donee. Our attention was invited on the declaration made by Shri K.R. Bhadha dated 3-12-1987 before the Commissioner for Oath, which reads as under :-

"I, Kerai R. Bhadha, a British citizen,

resident at

34 Summerhouse Avenue

Hastoa

Middlesex

TWS 99A

do hereby state, admit and solemnly declare as follows :

In the year 1986, I had purchased Premium Bonds of the face value of British Pounds Sterling £50.00 (fifty) in the name of Mrs. Roshan D. Nariman (my first cousin), as I considered her as my own sister, and as a lucky person.

I hereby make an unconditional gift here in London of the said Premium Bonds, together with the right to receive any prize thereon which has

already been declared or which may be declared in future to the said Mr. Roshan D. Nariman in consideration of my natural love and affection for her. I have now handed over the said Premium Bonds Certificate to Mrs. Roshan D. Nariman here in London.

Now onwards, I have no interest whatsoever in the said Premium Bonds or any prize in respect thereof and the said Mrs. Roshan D. Nariman has become the absolute owner thereof.

Sd/- Sd/-

Before Me : Dated 3rd Dec., 1987

Dated 3rd December 1987

C.R.B. COOKE

COMMISSIONER FOR OATHS

OWEN WHITE

32 36 SATH ROAD

HOU.S...OW MIDDLESEX

TW3 3LF"

5. The donee said to have accepted the gift on 3-12-1987. Our attention was invited on the oath made by the assessee before the Commissioner for Oaths, which is reproduced here as under :

"I, Mrs. Roshan Dinshaw Nariman, an Indian citizen and permanent resident of Bombay, India, on a temporary visit to London declare that the statement made overleaf by Mr. K.R. Bhadha, is correct and I hereby accept, here in London, the gift of Premium Bonds certificate of the face value of £50.00 (British Pound Sterling Fifty) from him with thanks together with the right to receive any prize thereon that has already been declared or that may be declared in future.

Sd/- Sd/-

Before Me :

Dated 3rd December 1987 Dated 3/12/87

C.R.B. COOKE

COMMISSIONER

FOR OATHS

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6. Shri Subramanian submitted that the unilateral action of Shri K.R. Bhadha

of buying bond in the name of the assessee by itself does not amount of a gift. The gift is completed only when it is accepted. In order to make a valid gift, it is essential that the gifted property must vest in the transferee. There cannot be a gift, in law, without vesting of the property gifted in the transferee and such vesting cannot take place without the consent or the concurrence of the transferee donee. According to ld. counsel, conjoint reading of sec. 2(xii), coining a definition of expression 'gift' and sec. (xiv), coining a definition of expression "transfer of property" makes it clear that before a transaction can be styled as a gift, it must be implied as a transaction of transfer by one donee to another, that is, there must be plurality of parties involved in the transaction. In other words, these provisions postulate that there must be a transaction between at least two parties. Thus, it must be bilateral or multilateral transaction. In that view of the matter, a unilateral transaction whereby a person purchases of his own, Premium Savings Bond, in the name of other, cannot be said to be covered by the definition of expression 'gift' in sec. 2(xii) of the Gift-tax Act. To support this contention reliance was placed on *CGT vs. Mrs. Jer Kalvin Lubimoff* (114 ITR 90) (Bom.), *CGT vs. Dr. R. B. Ramdin* 95 ITR 476 (Bom.), *CGT vs. Ebrahim Haji Usuf Botawala* (122 ITR 62) and *Gulab Rai Govind Prasad vs. CIT* (165 ITR 163). It was further contended that there is no provision in the Gift-tax Act by which the gift can relate back to the date of purchase of Premium Savings Bond.

7. Advertising to the prescription of sec. 115BB of the IT Act, ld. counsel submitted that since the prize received on the above said gift cannot be equated with the lottery prize, therefore the provision of sec. 115BB cannot be applied in the facts and circumstances of the present case.

8. Shri M.N. Bajpai, ld. D.R. appeared before us. At the outset, it was submitted that as on the day when the prize was declared, the Premium Savings Bond was in the name of the assessee. It is abundantly clear from the records that the assessee received prize directly. Since Sri K.R. Bhadha was not declared, it cannot be said that tile to that bond was transferred only subsequent upon the declaration of the prize. For making such transfer it is necessary that one must hold dominion over the object which is to be transferred. The Premium Savings Bond in question is not transferable. This fact is stated on the face of the Bond. Shri Bhadha had no legal claim over the prize declared thereon. Our attention was invited on the well known tenet of law embodied in the dictum : "NEMO DEBET QUA NON HABET". The purport of the dictum in *"he who hath not, cannot give." That is, no one can give better title than what he himself has.*

9. It was further stated that in England for all practical purposes, the money was received by the assessee. It was not treated as a gift as per the English Law. It is not known that how, for the tax purposes, the amount was considered in England. Since the Premium Savings Bond is not transferable there can be no agreement to make transfer of the same by way of gift.

Even if an agreement is effected, for such transfer, it ought to be treated as illegal and it shall have no value in the eye of law. What all could be said to have been gifted in the instant case is a sum of £50 which Mr. Bhadha parted while purchasing the bond. Coming to the applicability of sec. 115BB, it was contended that the amount of prize was picked out of the lot on random basis. This is exactly what the meaning of the word 'lottery' connotes. Sec. 115BB includes within its ambit winning from lotteries also. Our attention was invited on the dictionary meaning of word 'lottery'. Finally it was submitted that the amount in question was correctly taxed in the hands of the assessee.

10. We have heard the rival submissions in the light of material placed before us and precedents relied upon. The assessee is a resident in India, and in doing business in partnership in Bombay. Mr. K.R. Bhadha is cousin of the assessee. He is permanently residing in England. Mr. Bhandha, in January 1986 purchased the Premium Savings Bond in the name of the assessee. In Sept., 1987, the prize of £1,00,000 was declared. Money was claimed by the assessee and was repatriated to India. The assessee also sought permission from the Reserve Bank of India to hold the Premium Savings Bond. As per the scheme of the bond it may fetch prize in future also. An advertisement of the Premium Savings Bond which appeared in a British Paper was produced before us. This reads as under :

> "I am giving you a Premium Bond Gift Token for Christmas which could win you £250,000. Then you could buy out Father Christmas."

11. It was stated on behalf of the assessee that her husband, Shri Dinshaw Nariman was to undergo Heart Bypass Surgery by Dr. M. Laxman Kamath M.D. at Mount Sinai Medical Centre, Millwanbee, U.S.A. She left India with her husband on 8-12-1985 and reached U.S.A. on the same day. Her husband was operated upon on 10-12-1985. After the discharge it was necessary to stay near the hospital for a period of three weeks so that he could attend the hospital as an out patient for check up. On 12-1-1986, assessee went to London where she stayed with Mr. & Mrs. B.R. Irani, owners of Heritage House Hotel at 47-48 Leinster Gardens, Hyde Park, London. She was there till 18-1-1986. She returned to India on 19-1-1986. The date of purchase of the Premium Savings Bond as stated on the face of it, is Jan., 1986. No particular date is mentioned thereon. The following words are also there on the top of it "not transferable". Owner's name shown there is Mrs. R.D. Nariman and face value reflected thereon is £50. The following address is given on the said bond :

MRS. ROSHAN D. NARIMAN
HERITAGE HOUSE HOTEL
47/48 LEINSTER GARDENS
HYDE PARK
LONDON W2 3 AT

It is pertinent to note that during her sojourn in London, assessee stayed at the same address.

12. The term "gift" connotes the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or moneys worth. On examination of the facts of the present case, we find that as per the certificate, Premium savings Bond was purchased in Jan., 1986. The name of the assessee and the address where she stayed appears on the certificate. Considering the details, in the declaration filed by the assessee's cousin, Shri K.R. Bhadha, we find that if there was any gift, that was made in Jan. 1986 only, by depositing the amount of £50 towards the prize of Premium Savings Bond. The Premium Savings Bond is not transferable. The possessor cannot claim any title over the same. The prize was just a "Hidden Potentiality". The gift of the Premium savings Bond can be equated with the gift of a seed. If you cut down the seed you cannot get the tree there inside. But "Hidden Potentiality" of its being a tree is in the seed. For that it is to be kept inside the soil. It needs proper water, light and manure. If climatic conditions are favourable, after the flux of time, it may grow into a tree. Seed is not a tree. Of course, "Hidden Potentialities' or possibility of its being a tree is there in the seed. Likewise winning of the prize in the instant case was depended upon many imponderables - it permeated in a future eventuality - names were to be picked out of a lot on random basis - one may get- one may not get - purely a matter of luck and chance. This goes to show that prize element on the Premium Savings Bond was not an existing property at the time of its purchase. When it was pregnant with the prize, it was the property of the assessee as is evident from the document itself. The name of Shri K.R. Bhadha is not mentioned on the certificate. He had absolutely no title over the asset in question. Just by holding the possession over the asset he was not entitled to claim any prize declared thereon. It was payable only to the legal owner and not to the possessor. The dictum : "Nemo Debt Qua Non Habet" is squarely applicable in the facts of the present case. It was not possible on the part of Shri Bhadha to transfer the Premium Savings Bond in the name of any other person. No on ecan confer a better title than what he himself has. The precedents relied on by Shri Subramanian are on different facts.

13. It is not necessary here to consider how tax treatment was given to the said receipt in England. Since the amount was received in the name of the assessee it could not have been subject to the taxation in the hands of any other person.

14. Coming to the applicability of sec. 115BB, it is important to examine the meaning of the term "lottery". In the Attorney's Pocket Dictionary at page 297 the term is defined as under :

"The distribution of prize by lot or chance; a distribution of prize by

chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles; an allotment or distribution of anything by chance; a procedure or scheme for distributing prize by lot; the drawing of lots."

Section 115BB has been inserted by the Finance Act, 1986 with effect from 1-4-1987 by which a special provision was made to tax income from winning lotteries, cross words, puzzles etc. Winning from lottery therefore comes within the sweep of section 115BB. We find that in the instant case, winning of prize tantamounts to winning from lottery as contemplated u/s 115BB. We have perused the various reasons given by the revenue authorities. In our opinion, there is no infirmity in the impugned order. We, therefore, uphold the order of the CIT(A).

In the result, appeal of the assessee stands dismissed.

(1995) 126 Taxation 85 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

CHANDIGARH BENCH

(Before Shri J. Kathuria and Shri N.K. Agrawal)

ITA No. 507/Chandi/1986 & ITA No. 762/Chandi/1986

(Assessment Year 1983-84)

M/s Gopal Timbers, Shimla

vs.

Income-tax Officer, A-Ward, Shimla and vice versa

For the Appellant	:	**Sudhir Sehgal**
For the Respondent	:	**R.P. Singh**
Decided on	:	28-12-1994

NTEREST — Assessee claiming interest on borrowings Rs. 1,37,017/- — ITO disallowing Rs. 37,624/- being on funds allegedly used by partners for personal purposes — Held, all loans old — No fresh borrowing — No disallowance in earlier years — Also department failed to establish that any funds borrowed were diverted to partners' accounts — Addition deleted.

INTEREST — For delay in payments of royalty and sales-tax assessee paying interest of Rs. 9,34,119/- — ITO held interest of Rs. 2,15,090/- wrongly calculated and claimed — However ITO disallowing it in full i.e. Rs. 9,34,119/- being on account of breach of contract and penal in nature — Held, claim of interest correct, neither by way of breach of contract nor by way of infringement of law nor penal in nature — Held allowable.

ASSESSMENT— ITO adding Rs. 2,32,580/- on account of shortage

of 2383 scants — Held shortage was of 1313 scants only & the shortage being normal i.e. 2.3% no addition was called for.

ASSESSMENT — ITO claiming proper opportunity to represent not allowed by CIT (A) — Held CIT(A) sent two letters to ITO but no reply sent — CIT(A) afforded proper opportunity — Ground rejected.

FACTS

These are cross appeals. The assessee claimed in this appeal relief in regard to disallowance of interest of Rs. 37,624/- and confirmed by CIT(A). During the previous year the assessee paid interest of Rs. 1,37,017/- on borrowings. These were debit balances in the partner's accounts. ITO calculated Rs. 37,624/- as attributable to the sums diverted to the partners and used by them for personal purposes. CIT(A) confirmed this addition. The assessee also claimed interest of Rs. 9,34,118/- on account of delay in payments of royalty and sales-tax. ITO held that the claim was in excess to the extent of Rs. 2,15,090/- and also the whole interest being on account of breach of contract and penal in nature was disallowable. He thus disallowed Rs. 9,34,118/-. CIT(A) deleted this addition and revenue filed second appeal.

The ITO further noted shortage of 2383 scants and added back the value of the same at Rs. 2,32,580/-. CIT(A) deleted this addition also. The Revenue also claimed that while deciding the appeal the CIT(A) did not allow the ITO proper opportunity to represent.

DECISION

In regard to the disallowance of Rs. 37,624/- the Hon'ble Tribunal observed that no fresh loan was taken by the assessee during the previous year and all loans were brought forward from earlier years and no such addition was attempted in earlier years. There was no such stipulation in the partnership deed to charge from or to pay interest to the partners. The Assessing Officer without pinpointing the nexus between the fund borrowed and the amounts withdrawn by partners has merely proceeded on suspicion and surmises. The Tribunal thus held that there was no justification for CIT(A) to uphold the addition and the same was deleted. Regarding claim of interest on late payment of royalty and sales tax the Hon'ble Tribunal held that the interest had been rightly calculated by the assessee and it was not in excess to the extent of Rs. 2,15,090/-. As regards allowability or otherwise whole of such interest, the Tribunal held that it was not on account of any breach of contract or on account of infringement of law. Interest was paid for delayed payments not by way of any penalty but because the assessee had utilised those funds for its business purposes. The interest for belated payments was not by way of any penalty but perhaps by way of compensation for the period the funds were withheld and utilised for business purposes. The entire amount of Rs. 9,34,119/- was thus held to be allowable.

Regarding the addition on account of shortage of scants, the Hon'ble Tribunal noted that there was shortage of 1313 scants and not 2383 scants. The shortage thus was only 2.3% as against 3.5% in 1980-81 when no addition was made. Shortage of 2.3% was thus considered not excessive and the order of CIT(A) deleting the addition made by the ITO was confirmed.

In the last ground the revenue claimed that the ITO was not allowed proper opportunity to represent before CIT(A). The Tribunal noted that written arguments filed by the assessee were sent to ITO on 18-3-1986 for comments by 28-3-1986. Another letter was issued to ITO for comments and the appeal was decided on 21-4-1986. ITO did not ask for any extension. The Tribunal thus held that the CIT(A) was justified in deciding the matter as he did. The revenue's this ground was, therefore, also rejected.

Cases referred to :

1. *CIT vs. Delhi Safe Deposit Co. Ltd.* 133 ITR 756 (SC)
2. *Bhowra Kankanee Collieries Ltd. vs. CIT* 156 ITR 201 (Cal.)
3. *Mahalaxmi Sugar Mills Co. v. CIT* 123 ITR 429 (SC)
4. *Triveni Engg. Works Ltd. vs. CIT* 144 ITR 732 (All) F.B.
5. *Jairamdas Bhagchand vs. CIT* 171 ITR 545 (Bom.)

Full text of the Order is given below :

ORDER

(J. Kathuria, A.M.)

These cross appeals - one by the assessee and the other by the Revenue - pertain to assessment year 1983-84.

2. We shall first take up the assessee's appeal being ITA No. 507/Chandi/1986. The only effective ground in this appeal is against the confirmation of addition of Rs. 37,624/- for which the brief facts are these. The Assessing Officer found that as on 31-3-1983 i.e. the closing date for assessment year 1983-84, the debit balances in the partners' accounts came to Rs. 6,00,042/-. This figure included the share of losses of the partners from the assessee firm at Rs. 2,86,496/-. The Assessing Officer thus considered the balance amount of Rs. 3,13,546 (Rs. 6,00,042 - 2,86,496) as being on account of personal expenditure of the partners which was not for business purposes. Since the assessee had paid interest to Union Bank, Life Insurance Corporation of India and Shri Jetinder Singh to the extent of Rs. 1,37,017/-, the Assessing Officer considered a sum of Rs. 37,624/- as attributable to the debit balances in the partner's account of the firm. According to the Assessing Officer, the assessee had diverted a sum of Rs. 3,13,546/- out of the loans raised from the bank, LIC and Shri Jatinder Singh for the personal purposes of the partners. This according to him called for a disallowance out of the interest of Rs. 1,37,017/-. He

accordingly disallowed a sum of Rs. 37,624/-. The learned CIT(A) confirmed the disallowance.

3. Shri Sudhir Sehgal, the learned Counsel for the assessee, submitted that out of the 8 partners of the assessee firm only five partners had opening debit balances. Drawing our attention to the charge given at pages 52 and 53 of the assessee's compilation, it was submitted that apart from the withdrawals or payment of tax etc., there were very nominal withdrawals for purposes of personal use by the partners. It was also submitted that no fresh loans had been raised by the assessee from the Union Bank, the LIC and Shri Jatinder Singh. Our attention was drawn to pages 1 to 10 of the assessee's compilation to demonstrate that the loans from the aforesaid persons/parties had been raised in the earlier years and no fresh loans were taken in the year under consideration. It was submitted that there was no nexus between the funds borrowed by the assessee from the bank, the LIC and Shri Jatinder Singh and the amounts withdrawn by the partners. It was also submitted that in the earlier years also when the loans were taken by the assessee, there was no nexus between the amounts borrowed by the assessee and the amounts withdrawn by the partners. It was also pointed out that in the earlier years though assessments had been made u/s 143 (3) of the Act, no such disallowance was made by the Assessing Officer. It was also pointed out that in the partnership deed, there was no provision to charge interest from the partners on their debit balances. According to the learned Counsel for the assessee, the entire approach of the Assessing Officer was based on surmises and the learned CIT(A) had wrongly confirmed the addition of Rs. 37,624/-.

4. The learned D.R. relied on the orders of the authorities below.

5. We have carefully considered the rival submissions as also the facts on record. We are of the opinion that there was no justification for confirming the addition of Rs. 37,624/-. In the first instance, no fresh loans have been taken by the assessee from the bank, LIC or Shri Jatinder Singh in the year under consideration. The loans are brought forward ones from earlier years and the department has not established that the funds borrowed by the assessee had been diverted to the partners in the shape of withdrawals by them. It is also seen that in the earlier years, no such disallowance/ addition had been attempted by the Assessing Officer. Out of 8 partners, only 5 partners had debit balances and the remaining three partners had credit balances. There was no stipulation in the partnership deed to charge from or to pay interest to the partners. The Assessing Officer without pinpointing the nexus between the funds borrowed by the assessee firm and the amounts withdrawn by the partners has merely proceeded on suspicion and surmises. In our opinion, there was no justification for upholding the addition of Rs. 37,624/- which is hereby deleted.

6. Now we come to the departmental appeal being I.T.A. No. 762/Chandi/

1986. Ground Nos. 1 and 2 are interlinked and the facts giving rise to these grounds are as follows. The assessee is maintaining books of account on mercantile basis. The Assessing Officer noticed that in respect of lot No. 3/80-83, the assessee had claimed interest on royalty of Rs. 4,78,347 and interest on sales-tax of Rs. 3,35,091/-, aggregating to Rs. 8,13,438. Similarly it was noticed that the assessee had claimed interest on royalty of Rs. 1,06,326/- and interest on sales-tax of Rs. 14,354/-, aggregating to Rs. 1,20,680/- in respect of lot No. 10/79-82. Thus the total interest claimed by the assessee came to Rs. 9,34,118/- in respect of the aforesaid lots. The Assessing Officer, however, was of the opinion that the assessee had calculated interest on royalty and sales-tax on a higher side. According to him, the excess interest claimed as deduction by the assessee came to Rs. 1,54,833/- in respect of lot No. 3/80-83 and at Rs. 60,258/- in respect of lot No.10/79-82. The total excess interest claimed by the assessee, according to the Assessing Officer, thus worked out to Rs. 2,15,090/-. This, according to him, was not allowable at all because the assessee had a mistake in calculating the interest liability.

7. Another point made by the Assessing Officer was that even otherwise, the interest was not allowable because it was on account of break of contract and was penal in nature. So the Assessing Officer disallowed the total interest of Rs. 9,34,119/-.

8. The learned CIT(A), however, held that there was no mistake in the calculation of interest and secondly, the entire interest of Rs. 9,34,119 was allowable. The first two grounds are against the deletion of disallowance of interest of Rs. 9,34,119/-.

9. The learned D.R. submitted that the assessee was following mercantile system of accounting and that it had clearly made a mistake in calculating its interest liability and so to the extent of Rs. 2,15,090/-, there was an excess claim as demonstrated by the Assessing Officer. Secondly, it was submitted that according to clause (19) of the Agreement with the Department of Forest Farming & Environmental Conservation, Government of Himachal Pradesh, a copy of which was placed at pages 27 to 41 of the assessee's compilation, the amount of interest payable on un-paid royalty was 10% whereas the assessee had claimed the same at 15% and hence the excess claim was not allowable as a deduction in the year under consideration. It was further submitted that the entire amount of interest was by way of penalty and hence no part of it was allowable as a deduction from the assessee's total income. It was vehemently argued that the learned CIT(A) had wrongly allowed relief of Rs. 9,34,119/-. Reliance was also placed on the Bombay High Court decision in the case of *Jairamdas Bhagchand vs. CIT* (1988) 171 ITR 545 for the proposition that penalty payable under the Bombay Sales-tax Act was not interest and was, therefore, not deductible u/s 37 of the Act.

10. Shri Seghai, the learned Counsel for the assessee, submitted that as per section 17A of the Himachal Pradesh General Sales-tax Act, 18% interest was payable in case the Sales-tax was not paid in time. It was, therefore, pointed out that there was absolutely no discrepancy in the claim made by the assessee in respect of the sales-tax and the claim actually allowable to the assessee. As regards the royality, it was submitted that the Assessing Officer had not correctly interpreted clause (19) of the agreement between the assessee and the Department of Forest Faming and Environmental Conservation, Government of Himachal Pradesh. Drawing our attention to the detail of Lot No. 3/80-83 placed at page 57 of the assessee's compilation, it was submitted that there was no discrepancy in respect of interest payable on un-paid royalty. It was submitted that only 15% interest payable was clamie as a deduction and as such there was no dispute. According to the learned Counsel for the assessee, the dispute was in respect of lot No. 10/79-82. According to the Assessing Officer, the interest payable was only 10% whereas the assessee had claimed interest at the rate of 15%. It was vehemently argued that the interest had been correctly claimed at the rate of 15% in view of clause (19) of the agreement mentioned above. It was, therefore, submitted that there was no discrepancy in the amount of interest claimed as payable by the assessee. As regards the claim as such, the learned counsel for the assessee submitted that there was no breach of contract and there was no penalty imposed on the assessee. On the contrary, the submission was that the assessee had utilised the funds for business purposes and had, therefore, paid interest on account of less sales-tax payment and less royalty payments. It was vehemently argued that there was no breach of law and the payment was not penal in nature. It was also submitted that in the case of the assessee's sister concern, namely, M/s Rama Nand and Co. for assessment year 1983-84, assessment was made u/s 143(3) of the Act and no such disallowance/addition was made. It was further pointed out that in the assessee's own case in earlier years, similar amounts had been paid by way of interest and no addition had ever been attempted by the Assessing Officer.

11. The learned Counsel for the assessee also relied on the Supreme Court decision in the case of *Mahalakshmi Sugar Mills Co. vs. CIT* (1980) 123 ITR 429 for the proposition that interest payable on arrears of cess was not penalty and there was thus no infringement of law. The learned Counsel for the assessee also relied on the Full Bench decision of the Allahabad High Court in the case of *Triveni Engineering Works Ltd. vs. CIT* (1983) 144 ITR 732 for the proposition that interest payable in sugarcane arrears was in reality part and parcel of the liability to pay purchase tax and hence allowable u/s 37 of the Income-tax Act as a deduction. Reliance was also placed on the Calcutta High ~~Court~~ decision in the case of *Bhowra Kankane Collieries Limited vs. CIT* (1985) 156 ITR 201 for the proposition that interest paid on late payment of royalty was an allowable deduction. Reliance

was also placed on the Supreme Court decision in the case of *CIT vs. Delh Safe Deposit Co. Ltd.* (1982) 133 ITR 756 for the proposition that th true test of an expenditure laid out wholly and exclusively for purpose of trade or business is that it is incurred by the assessee as incidential his trade for purposes of keeping the trade going and of making it pa and not act in any other capacity than that of a trader. It was, therefor submitted that the entire amount of interest of Rs. 9,34,119/- was allowabl as a deduction and was correctly allowed by the learned CIT(A).

12. We have carefully considered the rival submissions as also the fact on record. Section 17A of the Himachal Pradesh General Sales-tax Ac reads as under :-

> "17A(1): If any dealer fails to pay the amount of tax due from him required by sub-section (4) of section 12, he shall, in addition to th amount of tax be liable to pay simple interest on the amount of ta due from him at the rate of one per cent per month from the dat immediately following the last date for the submission of the return unde sub-section (3) of that section, for a period of one month and thereafte at the rate of one and a half per cent per month till the default continues.

This section provides the payment of interest when the amount of sale tax is not paid in time. Initially the interest is payable at the rate of 12% per annum but afterwards, at the rate of 18% per annum. The assesse had, therefore, in our opinion, correctly calculated interest payable und the H.P. General Sales-tax Act, and the Assessing Officer was not justifi in allowing only 19% interest as admissible. As regards the calculation c interest on un-paid royalty, the learned Counsel for the assessee had pointe out that the discrepancy is only in respect of lot No. 10/79-82 in whic the interest has been charged at the rate of 15% by the assessee as again the interest of 10% considered by the Assessing Officer. We find that fo lot No.3/80-83, the assessee itself has claimed interest at the rate of 10' but for lot No. 10/79-82, interest has been claimed at the rate of Rs. 15' as per clause (19) of the agreement between the assessee and the Departme of Forest Farming and Environmental Conservation, Government of Himach Pradesh. There is, thus no mistake in the calculation of interest and the addition/disallowance of Rs. 2,15,090/- made by the Assessing Offic is not correct.

13. As regards the allowability or otherwise of interest as such on la payments of sales-tax and royalty, we do not agree with the reasoning the Assessing Officer that it was on account of breach of contract or c account of infringement of law. Interest was paid for delayed payments n by way of any penalty but because the assessee had utilised those fun for its business purposes. In the case cited by the Revenue, the Bomba High Court has held that penalty payable u/s 36(3) of the Bombay Sale tax Act was not interest and hence was disallowable. In the instant cas

however we find that the interest simpliciter had been charged for belated payments not by way of any penalty but perhaps by way of compensation to the Government for the period the funds were with held by the assessee and utilised for its business purposes. We accordingly hold that the entire amount of interest of Rs. 9,34,119/- was allowable as a deduction because it was neither as a result of breach of contract or by way of infringment of law nor was it penal in nature. ,Ground Nos. 1 and 2 are, therefore, rejected.

14. Ground No.3 is against the relief of Rs. 2,32,580/- allowed by the learned CIT(A). Brief facts in this regard are these. The Assessing Officer found that there was a loss of 1313 scants. He also noticed that there was further loss of 1070 scants. Thus according to him, there was a total loss of 2383 scants which had not been properly explained by the assessee. He accordingly held that these scants must have been sold outside the books of account. Applying a rate of Rs. 97.6 per scant, the Assessing officer worked out and made an addition of Rs. 2,32,580/-. The learned CIT(A), however, deleted the addition.

15. The learned D.R. relied on the order of the Assessing Officer.

16. Shri Sehgal, the learned Counsel for the assessee, submitted that the assessee was maintaining stock register. It was pointed out that the said stock register had been impounded by the Assessing Officer vide order dated 12-9-1985, that nothing had been brought to the notice of the assessee that there was any shortage and that the shortage of 1313 scants was normal. It was pointed out that for assessment year 1980-81, the shortage worked out to 3.5% which was accepted by the Assessing officer whereas for the year under consideration, the shortage was only 2.3% which had unfortunately attracted an adverse notice of the Assessing Officer.

17. As regards the alleged loss of 1070 scants, it was submitted that no such loss had been claimed by the assessee, that these scants were lying in the jungle and were part of the closing stock, that the evidence had been produced by the assessee before the first appellate authority to that effect and that the first appellate authority had accepted the same as correct. It was, therefore, submitted that the learned CIT(A) had correctly deleted the addition of Rs. 2,32,580/-.

18. After carefully considering the submissions of both the parties, we are of the opinion that the learned CIT(A) has correctly deleted the addition of Rs. 2,32,580/-. It has ben pointed out before us as it was pointed out before the learned CIT(A) that there was no shortage of 1070 scants as alleged by the Assessing Officer. These scants were lying in the jungle and were part of the closing stock of the assessee of 2383 scants. The only shortage was of 1313 scants which in a trade of this type is natural because riverine loss of scants is natural. We find that in the year under consideration, such transit loss has been claimed only at 2.3% on the scants numbering

to 28280. For the assessment year 1980-81, a higher loss of 3.5% had been claimed and allowed in the assessee's own case. In our view, the loss of 2.3% in the year under consideration cannot be said to be excessive or unreasonable. We accordingly uphold the order of the learned CIT(A) on the point and reject the ground of the Revenue.

19. Ground No. 4 is against the non-allowance of opportunity by the leaned CIT(A) to the Assessing Officer to represent the case. From para 2 of the impugned order, it appears that the written arguments were filed before the learned CIT(A) by the learned Counsel for the assessee on 14th March, 1986 and March 15, 1986. The learned CIT(A) forwarded these written arguments to the Assessing Officer on 18-3-1986 and called for his comment on 28-3-1986. Another letter was issued to the Assessing Officer calling for the latter's comments. The last date of hearing of the appeal was 19-4-1986. The appellate order was passed on 21-4-1986. The learned D.R. has not pointed out as to when the Assessing Officer applied for extension of time or why the Assessing Officer did not file the written submissions. From the aforesaid facts, it is clear that the learned CIT(A) was justified in deciding the matter as he did and that proper opportunity had been allowed to the Revenue. Since *ex parte* order had been passed by the Assessing Officer u/s 144 of the Act, the learned CIT(A) for the reasons mentioned in the impugned order had admitted certain documents as according to him, the assessee had been prevented by sufficient cause from submitting the same in time. We do not find anything wrong in the impugned order and this ground raised by the Revenue is, therefore, rejected.

20. In the result, the appeal of the assessee is allowed and that of the Revenue is dismissed.

(1995) 126 Taxation 93 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

CHANDIGARH BENCH

(Before Shri J. Kathuria & Shri N.K. Agrawal)

I.T.A. No. 339/Chandi/90

(Asst. Year 1988-89)

Income-tax Officer, Ward-II (7), Barnala

vs.

M/s Amarnath Ram Kumar, Barnala

For the Appellant	:	**K.S. Minhas**
For the Respondent	:	**R.K. Gupta**
Decided on	:	28-2-1995

TRADING ADDITION — Assessee firm deriving income from trading, sawing and hiring of timber — Survey conducted u/s 133A at the business premises of assessee — Assessee surrendering an income

of Rs. 1,00,000 for difference in the valuation of stock and low G.P. rate — A.O. applying a higher G.P. rate in the year under assessment on account of G.P. rate being lower than disclosed in the preceding year, i.e. A.Y. 1987-88 and thereby valuing an addition of Rs. 17,000/- — CIT(A) deleting the addition accepting assessee's contention that the G.P rate disclosed in A.Ys. 1986-87 and 1985-86 was accepted and no defect had been pointed out in the books of A/c — CIT(A)'s under upheld.

Income-tax Act, 1961 — Section 145.

CASH CREDIT — A.O. making addition of cash credit of Rs. 40,000/- for assessee's not producing the creditor and because of notice sent to the creditor coming back unserved — Assessee contending in appeal that the creditor firm had closed its business and that a common partner in assessee firm and creditor firm had filed a confirmation — CIT(A) allowing assessee's appeal — CIT(A)'s order upheld.

Income-tax Act, 1961 — Section 68.

DISALLOWANCE OF INTEREST — A.O. disallowing interest of Rs. 5215 as relating to earlier years — Assessee contending in appeal that the amount in question was debited to assessee's account by the bank in the accounting year under assessment — CIT(A) deleting the addition — CIT(A)'s order upheld.

Income-tax Act, 1961 — Section 36.

FACTS

The assessee firm was deriving income from trading, sawing and hiring of timber. For the assessment year 1988-89, the assessee filed return declaring an income of Rs. 1,73,430. A survey u/s 133A was conducted at the business premises of the assessee on 26-2-1988. The assessee surrendered an amount of Rs. 1,00,000 on account of difference in the valuation of stock of timber and also on account of low G.P. rate. Apart from the addition of the surrendered income of Rs. 1,00,000/- the A.O. made an addition of Rs. 17,000 by applying G.P. rate of 25% as against disclosed G.P. rate of 22.89% on account of lower G.P. rate of profit this year as compared to G.P. rate of 24.46% disclosed in the immediately preceding year i.e. A.Y. 1987-88. Assessee contended in appeal that in the A.Ys. 1985-86 and 1986-87, the G.P. rate shown as 21% and 22% respectively had been accepted and that in the year under assessment no specific defect in the books of account was pointed out by the A.O. Accepting assessee's plea, the CIT(A) deleted the trading addition.

As regards the second point, the A.O. noting a cash credit of Rs. 40,000 sent a notice to the creditor but the same was received back unserved. The assessee was required by the A.O. to produce the creditor and

creditor's books of A/cs but the assessee failed to do so. The assessee, however, produced a confirmation certificate from a common partner who happened to be a partner in assessee's firm as well as in the creditor firm. The A.O. not accepting assessee's plea regarding the identity and genuineness of the cash credit, made the addition of Rs. 40,000. In appeal the CIT(A) accepted assessee's contention that notice sent to the creditor firm was received back unserved as the firm had closed its business and since the confirmation had been filed by a common partner there was no ground for treating the deposit as a non-genuine entry. Accordingly the addition of Rs. 4o,000 was deleted by him.

As regards the third issue relating to the disallowance of interest, the assessee had debited two amounts of Rs. 4815/- and Rs. 199.52, aggregating to Rs. 5215 on account of interest charged by the bank. The A.O. disallowed this amount as the same related to earlier years. The assessee contended in appeal that though the amounts in question related to earlier years, but the same were debited to assessee's account by the bank on 27-5-1987 i.e. during the accounting year relevant to the assessment year 1988-89 under appeal and as such the claim was made in this year. The assessee's plea was accepted by the CIT(A) and the interest amount was accordingly allowed.

DECISION

As regards the first point it was held that mere non-maintenance of a stock register was not sufficient to reject the G.P. rate shown by the assessee, and therefore looking to the past history of the case and the nature of the addition, there was no force in the revenue's plea that the addition should be sustained.

As regards the second point it was held that the transaction had been duly proved by producing copy of the bank account showing the withdrawal of money as well as deposit by a bank draft. There was no challenge to the assertion that the depositor firm was an Income tax assessee, and therefore, identity of the depositor was also found to be not in doubt. Accordingly there was no justification of rejecting the cash credit entry.

As regards the third issue, it was held that there was no denial to the asscertion that the bank debited the assessee's account on 27-5-1987 by the two amounts in question and copy of the bank account proved that assertion. Therefore the expenditure appeared to have been rightly claimed in year under appeal in which it was charged by the bank.

Full text of the Order is given below :

ORDER

(N.K. Agrawal, J.M.)

This is an appeal by the revenue relating to the assessment year 1988-89

2. Ground No.1 relates to the deletion of addition of Rs. 17,000/- in the results of the trading account. The assessee firm derived income from trading, sawing and hiring of timber. Return of income was filed declarin total income of Rs. 1,73,430/-. A survey at the business premises of th assessee firm took place on 26-2-1988 u/s 133A of the Income-tax Act. The assessee surrendered an income of Rs. 1,00,000/- on account of difference in the value of stock of timber and also on account of low G.P.rate. The Assessing Officer, however, made the addition in respect of the surrendered income and also made addition on account of low G.P. rate. The assessee had shown sales at Rs. 8,10,225 and G.P. at Rs. 1,85,442 giving the G.P. rate at 22.89%. In the preceding assessment year, the assessee had shown a higher G.P. rate of 24.46%. Therefore, the A.O. applied the G.P. rate of 25% and made an addition of Rs. 17,090. It was noted by the A.O. that the assessee had not maintained any stock register nor a list of closing stock was furnished.

3. The assessee went in appeal with the plea that in the assessment year 1985-86, G.P. rate had been shown at 21% and in the next assessment year, namely, 1986-87, it was 22% only. Profits had been accepted in those two years. All the purchases and sales were claimed to be vouched and no specific defect was said to have been pointed out in the assessment. The assessee's plea found favour with the first appellate authority and the addition was deleted.

4. The ld. D.R. has contended that the assessee had not mentioned the quality of timber in the sale vouchers nor such details were found in the purchase bills. The assessee had also not maintained the sawing register nor the production register. Therefore, the G.P. is said to have been rightly fixed at 25%.

5. The ld. counsel for the assessee has submitted that the assessee had shown a higher G.P. rate if the assessments relating to the assessment years 1985-86 and 1986-87 are kept in view. In those two years, the G.P. rate had been shown at 21% and 22% respectively whereas in the assessment year under appeal, it has been shown at 22.89%. The enhancement was made simply for the reason that the assessee had shown a G.P. rate of 24.46% in the preceding assessment year. It has been also pointed out that surrender of income at Rs. 1 lakh had been made for two reasons, one on account of difference in the value of stock at the time of survey and also on account of the low G.P. rate.

6. We have considered the rival contentions and we are in agreement with the learned counsel that the G.P. rate shown by the assessee at 22.89% may be said to be slightly less as compared to the profit rate shown in the immediately preceding assessment year but the rate was definitely higher as compared to the assessment years 1985-86 and 1986-87. The past history of the case cannot be totally ignored particularly when no specific

defects have been found in the books of accounts. The learned counsel for the assessee has pointed out that it was not possible to keep a day-to-day stock register in view of the nature of the business. The business relating to timber did not permit the assessee to maintain a day-to-ay stock register due to practical difficulties. We agree with the ld. counsel that mere non-maintenance of a stock register was not sufficient to reject the G.P. rate shown by the assessee. Therefore, looking to the past history of the case and the nature of the addition, we find no force in the revenue's plea that the addition should be sustained. Ground No. 1 fails.

7. Ground No. 2 relates to the deletion of addition of Rs. 40,000/- u/s 68 of the Act. The A.O. noted a cash credit entry of Rs. 40,000 in the name of Shri Ram Rice Mills, Mandi Ahmedgarh. This entry had been shown in the books of accounts of the assessee as on 15-1-1988. The A.O. made the addition because a notice sent to the creditor came unserved. The assessee was required to produce the creditor but the assessee neither produced the creditor nor the creditor's books of accounts. There was, however, a common partner named Arun Kumar who happened to be a partner in the assessee's firm as well as in the creditor's firm. Arun Kumar confirmed the deposit in the assessee firm and also produced a copy of the assessee's account as appearing in the creditor's books of accounts. The A.O., however, did not accept assessee's plea regarding the identity and genuineness and made the addition.

8. The assessee went in appeal with the plea that the notice sent by the AO was received unserved because the creditor firm had closed its business. The common partner still produced a confirmation in respect of the deposit of Rs. 40,000/- with the assessee firm. Since a certificate had been duly filed, there was no question of treating the deposit as a non-genuine entry. The amount of Rs. 40,000/- was shown to have been withdrawn by the depositor firm from the bank account by cheque and thereafter the money was deposited with the assessee firm through a bank draft. The depositor firm was also said to be a regular assessee under the Income-tax Act. The assessee's plea was accepted in appeal.

9. The ld. D.R. has submitted that the genuineness of the transaction had not been properly explained because neither the depositor was produced nor the books of accounts of the depositor. The ld. counsel for the assessee has, in reply, contended that the reason for not producing the depositor was a valid reason because the depositor firm did no more exist. Moreover, Arun Kumar, who happened to be a common partner, was produced before the AO and on confirmation of the deposit, there was no question of rejecting the evidence tendered by him (Arun Kumar). The very withdrawal of money from the bank account and deposit of the same through a bank draft made it further clear that the identity of the depositor firm had been duly established.

10. Looking to the facts of the case, we are in agreement with the learned counsel for the assessee that the transaction had been duly proved by producing copy of the bank account showing the withdrawal of money as well as deposit by a bank draft. There is also no challenge to the assertion that the depositor firm, namely, Shri Ram Rice Mills, was an income-tax assessee. Therefore, identity of the depositor is also found to be not in doubt. There is, therefore, no justification for rejecting the cash credit entry. Ground No. 2, therefore, fails.

11. Ground No. 3 relates to the deletion of addition of Rs. 5,215/- made on account of interest. The assessee had shown payment of interest amounting to Rs. 1,63,387/-. The AO found two amounts, namely, Rs. 4,815/- and Rs. 199.52, as relating to the earlier years. These two amounts were disallowed. The assessee went in appeal with the plea that the two amounts in question though related to the earlier year but were debited to the assessee's account by the bank on 27-5-1987. The accounting period of the assessee ended on 31-3-1988. On the basis of the entry made by the bank charging interest, the assessee rightfully claimed deduction in the year under appeal. The assessee's plea was accepted.

12. The ld. D.R. has submitted that the expenditure was admittedly in respect of the interest relating to the earlier year and, therefore, could not be allowed in this year. The ld. counsel for the assessee has, in reply, submitted that the very charging of interest by the bank in the year under appeal gave rise to a claim for deduction in the year under appeal. The assessee could not claim any deduction until and unless the bank had debited the assessee's account. Since a debit entry was made by the bank during the year under appeal, the expenditure arose only in this year and, therefore, the assessee could claim deduction only after the interest was charged. We are in agreement with the learned counsel for the assessee and find no force in the revenue's plea that the expenditure could not be charged in the year under appeal. There is no denial to the assertion that the bank deposit debited the assessee's account on 27-5-1987 by the two amounts in question. Copy of the bank account proves that assertion. Therefore, the expenditure appears to have been rightly claimed in the year under appeal in which it was charged by the bank. Ground No. 3 has no force.

13. In the result, the appeal stands dismissed.

Tribunal Decisions

(1995) 126 Taxation 99 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH, JAIPUR
(Before Shri M.A.A. Khan and Shri J.K. Verma)
ITA Nos. 869 to 873/JP/91
(Assessment Years 1987-88 & 1988-89)

Assistant Commissioner of Income-tax

vs.

1. Shri Karniram, Bikaner
2. Shri Jiwanram, Bikaner
3. Shri Madanlal, Bikaner (for two years)
4. Shri Bheraram, Bikaner

and

C.O. Nos. 55-58/JP/92 arising out of above ITAs
Asst. Years 1987-88 and 1988-89

Shri Jiwanram & Ors.

vs.

Assistant Commissioner of Income-tax

For the Appellant	:	**A.K. Singh**
For the Respondent	:	**S. Ojha**
Decided on	:	24-10-1994

PENALTY FOR LATE FILING OF RETURN — The assessees who were partners in firm filed returns late — ACIT imposed penalties u/s 271(1)(a) — In first appeal penalties cancelled on the ground that firm's accounts completed late & assessees received their shares late — Held, no penalty having been imposed on firm; partners not be penalized — First appellate authority's views approved and order confirmed — Revenue's appeals and C.O. by assessees dismissed.

Income-tax Act, 1961 — Section 271(1)(a).

FACTS

The assessees were partners in a firm. The firm's accounts could not be completed in time with the result the assessees received their share income late and filed their returns of income also beyond the stipulated time. The assessees had no other income except share in firm. For late filing of returns the Assessing Officer imposed penalties u/s 271(1)(a) on the assessees. The first appellate authority cancelled the penalty orders on the ground that the assessees had received their share income from the firm quite late as the firm's accounts were not completed in

time. The revenue filed second appeals against these orders and the assessees filed cross objections supporting the order of the first Appellate Authority.

DECISION

The Hon'ble Tribunal observed that in the instant cases, the assessees had no other income except the share income from firm and that no penalty u/s 271(1)(a) was imposed on the firm. The Hon'ble Tribunal thus held that under such circumstances the view taken by the first appellate authority could not be claimed to be an unreasonable view. The appeals filed by the revenue and cross objections by the assessees were thus dismissed and the orders of the first appellate authority confirmed.

Cases referred to :

1. *Ramlal Aggarwal vs. CIT* 134 ITR 342 (MP)
2. *CIT vs. Dwarkadas Mool Chand* 134 ITR 392

Full text of the Order is given below :

ORDER

(M.A.A. Khan, J.M.)

In these sets of appeals, penalties of various amounts were levied on the respondents for the defaults under sec. 271(1)(a) of the I.T. Act, 1961 for late filing of returns. In appeals, however, the ld. First Appellate Authority cancelled the penalties on the ground that the respondents had received their share income from the firm, wherein they were partners, quite late, as the accounts of the firm were not completed in time. Aggrieved the Revenue has come up in appeals before the Tribunal. The respondents have filed the cross objections in their respective cases simply in support of the orders of cancellation of penalties.

2. The main contention of the ld. D/R was that since the respondents were quite independent assessees as they were under statutory obligations to file their returns in time and the late receipt of the share income therefrom as not sufficient quite reasonable cause to confer any benefit in their defaults. The ld. counsel for the assessees has, however, submitted that no penalty in the case of the firm itself was levied or if received, the same was cancelled on the ground that the accounts of the firm were not finalised in time. Under the circumstances, where the assessees had no source of income other than the share income of the firm and the firm itself was not penalised for filing its return late, the partners thereof should not be penalised. The ld. counsel for the assessees has supported his arguments with the case of *CIT vs. Dwarkadas Moolchand,* 134 ITR 392.

3. We have considered the rival submissions and have gone through the material placed on record. At one stage of the proceedings before the Tribunal, we had required the Deptt. to inform us if any penalty proceedings

were ever launched in the case of the firm wherein the respondents were partners. We could not be given a positive reply in that behalf, nor any penalty order passed in the case of the firm was ever produced before us. At the time of hearing, it was almost an undisputed position that no penalty for late filing of the return was ever levied in the case of the firm.

4. It could not be disputed before us that the respondent had no other sources of income save that share from the firm wherein they are partners. Their explanation was that since the accounts of the firm should not be finalised in time and they could not receive their share income from the firm in time, they could not file their returns of income within the statutory period. This explanation has been accepted as reasonable by the 1st Appellate Authority. In the case relied upon by the assessee, the accounts of the firm were not finalised and the partner was unable to ascertain his income. The Tribunal had held that the partner was prevented by a reasonable cause from filing the return in time. The MP High Court (Indore Bench) held that the finding recorded by the Tribunal was a finding of fact and no question of law arose out of such findings.

5. The ld. D/R submitted that the aforesaid decision of the MP High Court should not be a good guide for this Bench in upholding the orders of cancellation of penalties in the present case. In that behalf, he referred to the decision of the same High Court in the case of *Ramlal Aggarwal vs. CIT*, 134 ITR 342 wherein levy of penalty in similar circumstances was held to be justified. We, however, find that in that case, penalty under sec. 271(1)(a) had already been levied on the firm M/s Ramlal Aggarwal wherein the assessees in that case were partners. Such is not the position in the cases before us. Therein no penalty proceedings were ever initiated in the case of the firm of if at all initiated, such proceedings ended in favour of the assessee. That means that non-finalisation of the accounts in the case of the firm was held to be a reasonable cause for the purposes of levying penalty for the default punishable under sec. 271(1)(a) of the Act. The further distinguishing feature in the present case is that the undisputed fact that the assessees herein have no other source of income save that of share income from the firm in whose case, no penalty under sec. 271(1)(a) has been levied. Under such circumstances, the view taken by the First Appellate Authority for cancelling the penalties in the present cases can be claimed to be an unreasonable view. In that sense of the matter, we do not feel inclined to disturb the orders under appeal in any of the present cases.

6. Since the cross objections that are simply in support of the orders under appeal, which are being upheld, the time becomes infructuous.

7. In the result all the appeals by the Revenue and all the cross objections by the assessee are hereby dismissed.

(1995) 126 Taxation 102 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH, JAIPUR
(Before Shri. M.A.A. Khan and Shri Pradeep Parikh)
ITA Nos. 388 & 389/JP/1991
(Assessment Years 1985-86 & 1986-87)

Income-tax Officer, Ward I, Bikaner
vs.
M/s Hazarimal Ramlal, Bikaner

C.O. Nos. 27 & 28/JP/91
(arising out of ITA Nos. 388 & 389/JP/91)
Asst. Years 1985-86 & 1986-87

M/s Hazarimal Ramlal
vs.
Income-tax Officer

For the Appellant	:	**A.K. Singh**
For the Respondent	:	**Suresh Ojha**
Decided on	:	1-2-1995

PENALTY — Assessing Officer making trading additions on estimated and completed assessments on higher figures than returned — Also imposing penalties u/s 273(2)(a) — CIT(A) cancelling the penalties — Held, estimated additions no concrete evidence of income — Penalty not imposable — CIT(A)'s order confirmed.

Income-tax Act, 1961 — Section 273(2)(a).

FACTS

The assessee filed returns of income for the assessment years 1985-86 & 1986-87 declaring income of Rs. 48,872/- and Rs. 71,362 respectively. The Assessing Officer while completing the assessments made estimated trading additions and determined the income for both the assessment years at Rs. 1,15,409/- and Rs. 1,21,020/- respectively. Since the advance tax paid by the assessee was much lower than 75% of the assessed tax, the Assessing Officer imposed penalties of Rs. 5,000 & Rs. 4,300/- u/s 273(2)(a) for assessment years 1985-86 and 1986-87 respectively. CIT(A), however, deleted these penalties and the Revenue filed second appeal. The assessee also filed cross objections in support of the order of CIT(A).

DECISION

The Hon'ble Tribunal observed that in this case assessments have been completed on higher figures on account of trading additions. The Tribunal pointed out that Section 145 would be invoked (a) where the accounts were correct and completed but the method employed was such that the income

would not be properly deduced or (b) where the correctness or completeness of the accounts was not satisfactory or (c) where no method of accounting was regularly employed. It was not brought on record as to under which of the situations trading additions were made in this case. It could be a subjective opinion of the A.O. about the existence of any of the above situation and which could hardly be comprehended by an assessee. No penalty could be imposed where there was nothing concrete available with the A.O. with which the estimate of advance tax filed could be compared. It would just be to compare one estimate with the other. Thus following the judgment in the case of *Jaipur Metals & Electricals Ltd.* (97 ITR 721) the Hon'ble Tribunal held that in the instant case no penalty was impossible and confirmed the order of CIT(A) and allowed the cross objections.

Case referred to :

Jaipur Metals & Electricals Ltd. vs. CIT (97 ITR 721)

Full text of the Order is given below :

ORDER

(Shri Pradeep Parikh, A.M.)

These appeals by the department and cross objections by the assessee pertaining to assessment years 1985-86 and 1986-87 involve a common ground and hence are being disposed off by this consolidated order for the sake of convenience.

2. The only issue pertains to the levy of penalty by the Assessing Officer under section 273(2)(a) and the cancellation thereof by the ld. CIT (Appeals).

3. For the assessment year 1985-86, the assessee returned an income of Rs. 48,872/- and was assessed at Rs. 1,15,409/-. Similarly for assessment year 1986-87, the assessee returned an income of Rs. 71,362/- and was assessed at Rs. 1,21,020/-. For both the years, the assessments were completed at higher incomes on account of trading additions made by the Assessing Officer. The advance tax paid by the assessee for both the years amounted to Rs. 2,541/- and Rs. 5,646/- respectively. As the advance tax paid was much lower than 75% of the assessed tax, the Assessing Officer initiated penalty proceedings under section 273(2)(a) and imposed a penalty of Rs. 5,000/- and Rs. 4,300/- respectively for the two years.

4. The ld. CIT (A) cancelled the penalties in respect of both the years.

5. We have heard the rival submissions.

6. As per section 273(2)(a), penalty is leviable when the assessee files the statement of advance-tax or an estimate of advance-tax which he knew or had reasons to believe to be untrue. Past experience and the current results upto the date of filing the estimate would normally form the basis of filing the estimate. If subsequently, at the time of assessment, it is found that based on these facts only, the assessee had withheld the payment of advance

tax by filing a lower estimate of income, then penalty u/s 273(2)(a) would be attracted. In other words, inspite of sound basis available with him to file a true estimate, he files a lower estimate, thereby consciously withholding the payment of advance-tax, penalty would be imposable.

7. In the instant case, the assessments have been completed at higher figures on account of trading additions. Trading additions are made by involving the provisions of section 145. Section 145 would be invoked in either of the three situations, namely, (a) where the accounts are correct and complete, but the method employed is such that the income cannot be properly deduced therefrcm, or (b) where the correctness or completeness of the accounts is not satisfactory, or (c) where no method of accounting is regularly employed by the assessee.

8. It is not brought on record as to under which of the above situations, trading additions are to be made in the assessee's case. But essentially, it would be the subjective opinion of the Assessing Authority about the existence of any of the above situations. That the Assessing Officer would form such an opinion, can hardly be comprehended by an assessee. And when such a situation arises, the only course probably available with the Assessing Officer, is to determine the income on a fair estimate.

9. Thus while imposing penalty u/s 273(2)(a), in such a situation, the Assessing Officer would be comparing merely one estimate with another. No penalty can be imposed where there is nothing concrete available with the Assessing Officer with which the estimate of advance tax filed by the assessee can be compared. This may lead to adhocity and arbitrariness so far as imposition of penalties is concerned.

10. Our view is fortified by the decision of the Jurisdictional High Court in the case of *Jaipur Metals & Electricals Ltd. vs. CIT* (97 ITR 721).

11. We, therefore, uphold the orders of the ld. CIT(A) for both the years cancelling the penalty.

12. In the results, both the appeals are dismissed and the cross-objections allowed.

(1995) 126 Taxation 105 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH, JAIPUR

(Before Shri M.A.A. Khan and Shri Pradeep Parikh)

ITA No. 1090/JP/1990

(Assessment Year 1986-87)

Assistant Commissioner of Income-tax

vs.

M/s Modi Engineers

For the Appellant : **A.K. Singh**
For the Respondent : **N. Mertia**
Decided on : 8-3-1995

PENALTY — Assessee filing estimate but not paying advance tax — Assessing Officer initiating penalty proceedings u/s 273(2)(b) — During the hearing A.O. found estimate filed was also untrue — Issuing letter to assessee to show cause for penalty u/s 273(2)(a) also — Assessing Officer levying penalty of Rs. 10,000/- on both charges — CIT(A) cancelling penalty as no default u/s 273(2)(b) as estimate duly filed and that no proceedings initiated u/s 273 (2)(a) in the original notice — Held once proceedings initiated u/s 273(2)(b) penalty u/s 273(2)(a) could be imposed provided a proper opportunity afforded before passing order — Penalty imposed, however, cancelled as Revenue failed to establish malfide etc. on assessee's part.

Income-tax Act, 1961 — Sections 273(2)(a), 273(2)(b), 274 & 292B.

FACTS

During the course of assessment proceedings the Assessing Officer initiated penalty proceedings u/s 273(2)(b) for failure to file estimate of advance tax. The assessee during the course of hearing furnished evidence for filing of estimate. The A.O. however noted that the assessee had not paid any advance tax and that the estimate filed was also untrue. The Assessing Officer therefore by virtue of a letter asked the assessee to show cause as to why penalty u/s 273(2)(a) be also not imposed. The Assessing Officer rejected the assessee's plea that the challan for making payment of advance tax had been misplaced at the time of filing the estimate and that as soon as it came to its knowledge the tax was paid u/s 140A and the Assessing Officer imposed a penalty of Rs. 10,000 on both the charges u/s 273(2)(a) and 273(2)(b). In appeal the CIT(A) cancelled the penalty holding that as the assessee had duly filed the estimate there was no default u/s 273(2)(b) and that there was no mention in the original notice regarding default u/s 273(2)(a). Aggrieved by the CIT's order the Revenue filed second appeal.

DECISION

The Hon'ble Tribunal observed that u/s 209A the liability to pay the advance tax alongwith the filing of the estimate clearly flows not only from the heading given to this section but also from the express language used therein. Such an interpretation advances the smooth functioning of this provision. The Tribunal thus approved the approach of the A.O. in this behalf. Regarding issue of a notice u/s 273(2)(a) during the course of assessment proceedings the Hon'ble Tribunal pointed out that section 274(1) does not speak of the requirement of issuing any notice as condition precedent for initiating penalty proceedings under chapter XXI. The only requirement was to give a proper opportunity of being heard before the penalty was imposed. Further any mistake defect or omission relating to the furnishing of the return making assessment, issuance of notice or summons and taking of proceedings which would be curable u/s 292B would not vitiate the return, assessment, notice or summons or other proceedings. Since in this case the A.O. had specifically required the assessee to answer the default furnishable u/s 273 (2)(a) and had thereafter given proper opportunity of being heard before levying penalty, no irregularity in the proceedings was committed by him.

However, about the merits of levy of penalty the Hon'ble Tribunal held that while rejecting the assessee's explanation the A.O should have adduced further proof of a *malafide* intention or dishonest conduct on the part of the assessee. The Assessing Officer has placed no material on record to show that the assessee had deliberately acted in defiance of his statutory obligation in the matter of payment of tax. He has also not mentioned in his order as to how the estimate filed by the assessee was untrue to his knowledge. Therefore, the Tribunal confirmed the deletion of penalty as per CIT(A)'s order but on different grounds.

Cases referred to :

1. *CIT vs. Vijayanti Mala* 108 ITR 882 (Mad.)
2. *CIT vs. B.P. Mehta* 199 ITR 654 (Guj.)

Full text of the Order is given below :

ORDER

(M.A.A. Khan, J.M.)

In this case the Assessing Officer (A.O.) initiated penalty proceedings for assessee's default of failure to file the estimate of advance-tax payable punishable u/s 273(2)(b) of the Income-tax Act, 1961 (the Act). In the course of the proceedings, the assessee proved that he has filed such estimate on 13-12-1985. But the A.O. noted that though the estimate had been so filed, yet the assessee had not paid the advance-tax. He, therefore, held the assessee a defaulter for the purposes of sec. 273(2)(b) of the Act.

2. In the course of the penalty proceedings, the A.O. further noted that

the estimate of advance tax payable by the assessee was untrue. He, therefore, called upon the assessee by his letter dated 3-3-1989 to show cause as to why penalty for default punishable u/s 273(2)(a) be not levied upon him. By his reply dated 5-3-1989, the assessee explained that the estimate had been filed by him well within time but the reason for not paying the advance-tax was mentioned by him in his reply. In his earlier reply, the assessee had explained that by reason of the challan having been misplaced, he could not pay the advance-tax of Rs. 8,050/- but when that case came to his notice at the time of filing the return he paid the tax u/s 140A at Rs. 60,202/- on 4-6-1986. The A.O. did not feel satisfied with this explanation and he held the assessee defaulter for sec. 273(2)(a) as well. Thus the A.O. found the assessee defaulter for both the provisions of sec. 273, namely sec. 273(2)(a) as well as sec. 273(2)(b) of the Act. The A.O. levied a penalty of Rs. 10,000/- accordingly.

3. In appeal, the ld. CIT(A) held that since the assessee had filed an estimate of advance-tax payable, he was not a defaulter for the purpose of levying penalty u/s 273(2)(b). He further held that since the proceedings were not initiated for assessee's default punishable u/s 273(2)(a), he was not to be vitiated with penalty under that provision either. The ld. CIT(A) thus cancelled the penalty and allowed assessee's appeal.

4. The ld. D/R submitted that the defect, if any, either in the notice issued u/s 274 in the proceedings held in this case, was a curable irregularity and since due notice of the actual default committed by the assessee was given to him before levying the penalty, such defect stood cured. He further submitted that since the assessee had undisputedly not paid the amount of advance-tax payable by him as per provisions of sec. 209A a default punishable u/s 273(2)(b) as well as u/s 273(2)(a), was committed. He, therefore, urged for restoration of the penalty.

5. The ld. counsel for the assessee submitted that in the instant case no default, either u/s 273(2)(a) or u/s 273(2)(b) could be said to have been committed by the assessee inasmuch as the assessee had filed an estimate of advance-tax payable and it was not proved that such estimate was untrue. Mr. Mertia further submitted that default in paying the estimated advance-tax could be punishable u/s 218 but not u/s 273(2)(a) or 273(2)(b) of the Act. In this behalf, Mr. Mertia relied upon the Madras High Court decision in *CIT vs. Vijayanti Mala* 108 ITR 882 and Gujarat High Court decision in *CIT vs. B.P. Mehta,* 199 ITR 654 We find ourselves in agreement with Mr. Mertia.

6. Section 207 of the Act casts an obligation to pay advance-tax in respect to the total income of the assessee which would be chargeable to tax for the current year. Section 208 lays down the conditions of the liability to pay advance-tax and sec. 209 tells the mode and manner to compute such

tax. Sec. 209A, which has since been omitted by Direct Tax Laws 'Amendment) Act, 1987 w.e.f. 1-4-1988 dealt with the computation and payment of advance-tax by the assessee. The relevant part of that sec. as s material for our purpose, ran as under, at the relevant time :-

"209A : Every person shall in each financial year, on or before the date on which the first or where he has not previously been assessed by way of regular assessment under this Act, on or before the date on which the last instalment of advance-tax is due in his case under sub-sec. (1) of sec. 211, if his current income is likely to exceed the amount specified in sub-sec. (2) of sec. 208, send to the ITO —

(a) where he has been previously assessed by way of regular assessment under this Act, a statement or advance-tax payable by him computed in the manner laid down in clause (a) or as the case may, sub-clause (i) of clause (d) of sub-sec. (1) of sec. 209 or

(b) where he has not previously been assessed by way of regular assessment under this Act, an estimate of —

(i) the current, income, and

(ii) the advance-tax payable by him on the current income calculated in the manner laid down in sec. 209,

and shall pay such amount of advance-tax —

(I) in a case falling under clause (a), as accords with the statement in equal instalments on the dates applicable in his case under sec. 211; and

(II) in a case felling under clause (b), as accords with the estimate in equal instalments on such of the dates applicable in his case as have not expired, or in one sum if only the last of such dates has not expired."

It may be seen that the obligation casts on an assessee, who had not een previously assessed by way of regular assessment under the Act, was) send to the ITO an estimate of (i) his current income and (ii) the advance-ıx payable by him on the current income. The further requirement was › pay the amount of advance-tax payable. This last obligation is clearly orne out from the heading given to this section as also from the clause and shall pay such amount of advance-tax" used below the two categories f the assessees enumerated under clause (b) of sub-sec. (1) of sec. 209A. ıe obligation to pay the amount of advance-tax is very much explicit from ıe language of this section. Otherwise also it makes no sense that obligation : file the estimate of advance-tax payable only without further obligation paying the amount of such advance-tax was cast upon the assessee by ıe legislature. Liability to pay the amount of advance-tax along with the ing of the estimate of the current income and the advance-tax payable early flows not only from the heading given to this section but also from

the express language used therein. Such an interpretation advances the smooth functioning of this provision otherwise the very purpose of enacting that provision would get frustrated. In this behalf we approve of the approach adopted by the A.O.

8. The argument of Mr. Mertia that the non-payment of advance-tax is punishable u/s 218 and not u/s 373 appears to be totally misconceived. The relevant parts of the two provisions, as are material for deciding this appeal, ran as under at the relevant time :-

218 "If any assessee does not pay on the date specified in sub-section (1) of sec. 211, any insfalment of advance-tax that he is required to pay by sec. 210 and does not on or before the date on which any such instalment as is not paid becomes due, send to the A.O. an intimation under sub-sec. (5) of sec. 210 or does not pay on the basis of his estimate of his current income the advance-tax payable by him under sub-section (6) or section 210, he shall be deemed to be an assessee in default in respect of such instalment or instalments."

273(2) : "If the A.O. in the course of any proceedings in connection with the regular assessment for the assessment year commencing on the 1st day of April, 1970, or any subsequent assessment year is satisfied that the assessee —

(a) has furnished under sec. 2(1) or sub-section (3) or (5) of Section 209A, or u/s 212(2)(1) an estimate of the advance-tax payable by him which he knew or had reason to believe to be untrue, or

(aa) X X X X X X X X X

(b) has failed to furnish an estimate of advance-tax payable by him in accordance with the provisions of sub-section (4) of section 209A or u/s 212(3A)"

9. It may be noted that sec. 218, deals with the situation when an assessee is deemed to be in default. It speaks of those assessees who have been assessed to tax by way of regular assessment, but have not paid the instalment of advance-tax despite AO's notice u/s 210 or have failed to pay the advance-tax as per their estimates of current income despite such notice. The default contemplated in this section is related to the non-compliance of AO's order passed u/s 210(3) or 210(4) of the Act. The default contemplated is specifically punishable u/s 221 of the Act.

10. The provisions contained in either sec. 273(2)(a) or (b) on the contrary, do not necessitate the issue of any order of A.O. u/s 210 for their application. They intend to punish an assessee who has either totally failed to furnish the estimate of the advance-tax payable or if he has furnished one the same is found untrue to his knowledge. This sec. 218 and sec.

273(2)(a) and (b) materially differ in their purposes and field of operation.

11. At this stage we would like to deal with another requirement for imposing the penalties enumerated under Chapter XXI of the Act. Sec. 274 lays down the procedure for levying such penalties. Sub-section (1) of Section 274 which is relevant for our purpose, runs as under:—

> "Sec. 274(1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard."

It may be noted that sec. 274(1) does not speak of the requirement of issuing any notice as condition precedent for initating penalty proceedings under Chapter XXI. What is required for valid imposition of the penalties under Chapter XXI is to hear the assessee, or to give him proper opportunity of being heard before the penalty is actually imposed. Since no statutory notice is to make the basis of levy of penalty under Chapter XXI there would arise no question of changing the basis in the course of hearing of the proceedings. If in a given case A.O. has issued a notice to the assessee to answer a particular charge and the A.O. has also initiated penalty proceedings on the basis mentioned in the notice given by him to the assessee, he may change that very basis to another and impose penalty accordingly provided that he has heard the assessee or has given to him a proper opportunity of being heard on the changed basis, before imposing penalty upon the assessee. The provisions of sec. 274 in fact make safeguard against the violation of the principle of natural justice which required that no person should be condemned without hearing. This provision thus advances the spirit of Article 21 of the Constitution of India. It should not be interpreted as laying down the requirement of issue of any statutory notice as condition precedent for the very initiation of penalty proceedings under the Act.

12. Further if any mistake, defect or omission has been committed in relation to the furnishing of a return of income, making an assessment, issuing a notice or summons or taking the proceedings but the return of income furnished assessment made, notice or summons issued, or proceedings taken are in substance and effect in conformity with or according to the intent or purpose of the Act, such mistake, defect or omission would not invalidate the return of income, assessment notice or summons or the proceedings. Section 292B regards such mistakes, defects or omission as being of procedural natural amounting to curable irregularity only. Any mistake, defect or omission, relating to the furnishing of the returns, making assessment, issuance of notice or summons and taking of proceedings, which is curable u/s 292B does not vitiate the return, assessment, notice or summons or other proceedings. But the true nature and character of the mistake, defect or omission shall have to be considered with reference to the effect or consequences from the mistake, defects or omissions upon the decision of the issue involved in a given case

13. Now coming to the merits of the case, we find that the assessee admittedly is a person who had not hitherto been assessed to tax by way of regular assessment. In view of that factual position, the provisions of sec. 209A(1) (b) were applicable. Further since he had furnished an estimate of advance-tax, though not paid such tax, the provisions of sec. 273(2)(b) were not applicable to his case. The view of the AO that since the assessee had not paid advance-tax and hence he was a defaulter for the purposes of sec. 273(2)(b) was obviously wrong.

14. The main requirement for attracting the provisions of sec. 273 (2)(b) in the failure of an assessee to furnish the estimate of advance-tax payable further requirement of paying advance-tax flows from the language of sec. 209A(1)(b) which has not been referred to in sec. 273(2)(b), though the same has been used in the language of sec. 273(2)(a). What had not been intended by the Legislature in making assessee's default punishable u/s 273(2)(b) should not be imported in its language for the purpose of levying penalty. In fact the non-payment of advance tax is ordinarily a natural consequence of the failure to furnish the estimate of advance-tax. In a given case an assessee may be found to have paid advance-tax without furnishing the estimate thereof. In that situation the default may be punishable, if at all, u/s 273(2)(a) and not u/s 273(2)(b). For in the act of making payment of advance-tax an assessee may be deemed to have furnished the required estimate of advance-tax at the figure of the actual amount paid by him by way of advance-tax. The tax so paid may be short of his liability and in that case it may be inferred that the estimate made by him of his liability u/s 209A(1) incorrect and untrue to his knowledge. His default of making short payment of his advance-tax liability may thus be punishable u/s 273(2)(a). In the administration of the provisions contained in sec. 273(2) it should be kept in mind that purpose is to enforce the payment of correct amount of advance-tax payable by an assessee and not to necessarily punish him.

15. Now to coming to the merits to the imposition of penalty under sec. 273(2)(a), the mere fact that the assessee did not pay the advance-tax along with the assessee did not pay the advance-tax along with the furnishing of the estimate of advance-tax payable without further proof of a *mala fide* intention or dishonest conduct on the part of the assessee should not result in penalty under this provision. The case of the assessee was that the challan meant for making payment of advance-tax had been misplaced at the time of furnishing the estimate of such tax. But as soon as the assessee came to know of the likely consequences, he deposited the tax u/s 140A of the Act. This conduct of the assessee has not been controverted by the Revenue. The AO has placed no material on record to show that the assessee had deliberately acted in defiance of his statutory obligations under the Act. He has not even mentioned in his order as to how the estimate filed by the assessee was untrue to his knowledge. He did not mention the figures

of estimated current income, the returned income and the finally assessed income of the assessee. Under such circumstances the ratio of the decisions of the Madras and Gujarat High Courts in the cases relied upon by the assessee applied to the benefit of the assessee.

16. In the Madras case, which was a case for penalty u/s 221, the Madras High Court held that simply because an assessee has incurred the liability to pay penalty, it is not obligatory on the part of the officer to levy a penalty, whether a penalty should be levied or not and if so what should be the quantum of the penalty will depend on the facts and circumstances of each case which will primarily concern whether the default was wilful or merely accidental.

17. Likewise, in the Gujarat case which was a case for default punishable u/s 273(2)(c) the Gujarat High Court held that 'liability for penalty u/s 273(2)(c) is incurred by the assessee only when the assessee fails to furnish an estimate of advance-tax payable by him in accordance with the provisions of sec. 212(3A). Sec. 273(2)(c) does not deal with the liability which may arise because of failure of the assessee to pay such amount of advance-tax as accords with his estimate of advance-tax.' That is also a point which we have highlighted at an earlier part of this order. Both these cases fully support our view point and therefore, we hold that imposition of any penalty either u/s 273(2)(a) or 273(2)(b) in this case was not justified and has rightly been cancelled.

18. Before we close, we would like to add that since the AO had specifically required the assessee to answer the default punishable u/s 273(2)(a) and had, thereafter given him proper opportunity of being heard, before levying the penalty no irregularity in the proceedings was committed by him. The ld. CIT(A) has taken a wrong view of the legal position of the point. But in view of what has been discussed above, we uphold the order under appeal on merits of the case, though for other reasons.

19. In the result the appeal is dismissed.

(1995) 126 Taxation 112 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

COCHIN BENCH

(Before Shri Y. Santhanam & Smt. P.K. Ammini)

ITA No. 331/Coch./1990

(Assessment Year 1986-87)

M/s Phoenix Plywood (P) Ltd., Kottayam

vs.

Income-tax Officer, Ward-1, Kottayam

For the Appellant : **R. Srinivasan**

For the Respondent : **T. John George**

Decided on : 24-2-1995

CAPITAL OR REVENUE EXPENDITURE — Assessee installing Feed Mats costing Rs. 1,32,666/- — ITO treating this expenditure as capital and allowing depreciation — First appeal rejected — Held, Feed Mats used for conveying the products to drums fitted with abrasive materials are worn out after 8 to 10 months — Hence to be allowed as a revenue expenditure.

Income-tax Act, 1961 — Section 37.

FACTS

During the year the assessee installed two Feed Mats costing Rs. 1,32,666/- and claimed this amount as Revenue Expenditure. The Assessing Officer, however, treated the same as a capital expenditure and allowed depreciation on it. In first appeal the CIT (A) confirmed the order of the Assessing Officer. The assessee filed a second appeal.

DECISION

The Hon'ble Tribunal found that the Feed Mat was an accessory for Drum Sander, the machine used for sending the products for smoothness. Feed Mat otherwise known as endless conveyor belt was used for conveying the products to the Drums fitted with abrasive materials. The belts were rubberised materials which in the process get systematically damaged and with systematic maintenance of the machine and careful handling the feed mats could be used for 8 to 10 months and thereafter it would be worn out. Accordingly the Hon'ble Tribunal held that the expenditure in question was a revenue expenditure and the deduction of Rs. 1,32,666/- was allowed.

Case referred to :

CIT vs. Mahalakshmi Textile Mills Ltd. 66 ITR 710 (SC)

Full text of the Order is given below :

ORDER

(P.K. Ammini, J.M.)

This appeal by the assessee relates to the assessment year 1986-87.

(2) The first ground in this appeal is against the disallowance of Rs. 1,32,666/- treating it as capital expenditure. The assessee, a private limited company, is engaged in the manufacture of commercial plywood. During the year under consideration, the assessee had installed two Feed Mats costing Rs. 1,32,666/-. The assessee claimed it as a revenue expenditure allowable under the provisions of the IT Act. The Assessing Officer, however, rejected the assessee's claim for deduction on the ground that the said expenditure is capital expenditure but allowed depreciation thereon at the ordinary rate. On appeal, the CIT(Appeals) sustained the addition. The assessee is aggrieved.

(3) We have heard rival submissions and perused the records. On the facts and circumstances of the case, we are of the opinion that the CIT(Appeals) was not justified in treating the expenditure in question as capital expenditure. According to the assessee, the feed mat is an accessory for Drum Sander, the machinery used for sanding the products for smoothness. Feed Mat otherwise known as endless conveyor belt is used for conveying the products to the drums fitted with abrasive materials. The assessee's products are heavy items like Block Boards, Plywood etc. and the belts are rubberised materials which in the process get systematically damaged. Hence, the life expectancy of the product is not long. With systematic maintenance of the machine and careful handling, the feed mats can be used for a period of 8 to 10 months without problems. Thereafter, it gets worm out. Hence, it is the contention of the assessee that the expenditure incurred for feed mats is nothing but the expenditure incurred for replacement of the worn out accessories. We accept this contention of the assessee and hold that the expenditure in question is a revenue expenditure allowable under the provisions of the I.T. Act. Our view is fully supported by the decision of the Supreme Court in *CIT vs. Mahalakshmi Textile Mills Ltd.* (66 ITR 710) wherein it has been held that the Tribunal had evidence before it from which it could be concluded that by introducing the "Casablanca conversion system" the assessee made current repairs to the machinery and plant and the sum of Rs. 93,215/- was allowable as an expenditure incurred for current repairs under section 10(2)(v) of the Act. We allow the claim of the assessee in the instant case for deduction of Rs. 1,32,666/- as revenue expenditure.

(4) In the light of our finding that the expenditure incurred for replacement of worn out accessories is a revenue expenditure allowable under the IT Act, the other issues raised in the grounds of appeal do not survive for our consideration. The appeal is allowed in part.

(1995) 126 Taxation 114 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

COCHIN BENCH, COCHIN

(Before Shri G. Santhanam and Smt. P.K. Ammini)

ITA Nos. 470, 471 and 472 (Coch.)/1990

(Assessment Years 1984-85, 1985-86 and 1986-87)

M/s Olympic Wines, Kottayam

vs.

The Income-tax Officer, Ward I, Kottayam

For the Appellant	:	**R. Srinivasan**
For the Respondent	:	**P. Balakrishnan**
Decided on	:	21-2-1995

REGISTRATION OF FIRM — Assessee doing Abkari business —

ssessed as Registered Firm — CIT noticing most of shops were ld in the names of persons other than partners & no licence in ıe name of firm to run Abkari business — Commissioner set siding the orders u/s 263 — Held, there being no prohibition)r transfer of licence in Abkari Act, the firm was entitled to egistration.

ıcome-tax Act, 1961 — Sections 185 and 263.

:rala Abkari Act.

FACTS

he assessee a partnership firm was doing Abkari business and was ssessed as Registered firm. The learned Commissioner of Income-tax oticed that most of the shops were bid in the names of persons other ıan the partners and that no licence was issued in the name of the artnership to run the Abkari business. He therefore held that the firm as not entitled to registration and set aside the assessments for redoing ıe same in accordance with law. The assessee filed appeal.

DECISION

ıe Hon'ble Tribunal observed that clause 4 of the partnership deed dt. -4-1983 stated that even though these shops were obstensibly bid in the ame of others; these were in reality bid as agents of the partners and ın by the firm. Further there was no prohibition in the Kerala Abkari Act r a firm to run the Abkari business and that there was no prohibition r transfer of licence. Further as stated the licences were obtained in those ames to make up for the solvency to be provided at the time of bid. The ribunal thus held that the firm was entitled to registration and set aside ıe order of the Commissioner.

Cases referred to :

. *ITO vs. Raveendra Engineering Construction Co.* 198 ITR 32 AT

. *Sree Murugan Trading Co. Mavelikkara* ITA No. 107 (Coch.) 1989 dt. 27-2-1992 (Coch.)

ull text of the Order is given below :

ORDER

3. Santhanam, A.M.)

hese appeals are by the assessee. The appeals relate to the assessment ears 1984-85, 1985-86 and 1986-87.

. The assessee is a partnership firm doing Abkari business. The firm was ssessed in the status of a registered firm. The learned Commissioner of come-tax noticed that most of the shops were bid in the names of persons ther than the partners and that no licence was issued in the name of the artnership to run Abkari Business. Therefore, he was of the view that the

assessee was not entitled to registration. In this view of the matter, he set aside the assessment orders with a direction to the Assessing Officer to redo the assessments in the correct status in accordance with law. The assessee is in appeal against the order of the Commissioner of Income-tax under sec. 263 of the I.T. Act.

3. It is brought to our notice that the issue is squarely governed in favour of the assessee in the Special Bench decision of the Tribunal in the case of *ITO vs. Reveendra Engineering Construction Co.* 198 ITR 32 AT. The assessee also relies on the decision of the Tribunal dated 27-2-1992 in ITA No. 107 (Coch.)/1989 in the case of *M/s Sree Murugan Trading Co., Mavelikkara.*

4. We have heard rival submissions and perused the records. The licences for some of the shops were held in the names of the partners. In respect of some other shops the licence was taken in the names of persons who were not partners. However, clause 4 of the partnership deed dated 1-4-1983 stated that even though these shops were ostensibly bid in the names of others, these were in reality bid as agents of the partners and run by the firm. There is no prohibition in the Abkari Act for a firm to run the Abkari business. Further, the Special Bench in the case cited supra noticed that none of the provisions of the Abkari Act prohibited transfer of licence. It also noticed that there was no provision in the Kerala Abkari Act making the transfer of licence without permission a punishable offence. Further it is urged that the licences were obtained in the name of non-partners in some cases in order to make up for the solvency to be provided at the time of the bid. In view of these facts, we hold that the firm is entitled to grant of registration. The order of the learned Commissioner of Income-tax under section 263 of the I.T. Act is set aside.

5. The appeals are allowed.

(1995) 126 Taxation 116 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'A', NEW DELHI

(Before Shri Vimal Gandhi and Miss Moksh Mahajan)

ITA No. 3833/Del./1985

(Assessment Year 1982-83)

M/s Dilip Kumar Kali Charan, Agra

vs.

Income-tax Officer, Circle II, F Ward, Agra

For the Appellant : **C.S. Aggarwal**

For the Respondent — **S.C. Gupta**

Decided on . 30-11-1994

REGISTRATION OF FIRM — One of the partners of assessee firm was a Pvt. Trust — ITO holding in order u/s 143(3) that business income which was diverted to the trust actually belonged to the firm — As such firm held to be not genuine and registration refused — CIT(A) confirming ITO's order also holding that profits not divided, distributed, credited as per partnership deed and Application Form No. 11 — Held, no material that Trust's profit shared by partners — Not a case of Benamidar of other partner — Firm entitled to registration.

Income-tax Act, 1961 — Sections 184 and 185(1)(b).

Income-tax Rules, 1962 — Rules 22-24 and Form No. 11

FACTS

Assessee a firm and one of the partners of a Private Family Specific Trust. While passing order u/s 143(3), the ITO held that the wholesale business in sarees, the income of which was diverted to the trust belonged to the firm and as the firm was held not genuine the ITO refused registration while passing order u/s 185(1)(b). In appeal the CIT (A) while confirming ITO's order also held that the profits earned were not distributed, divided or credited in accordance with the constitution so specified in the deed of partnership and in the manner shown in Application in Form No. 11. The assessee filed a second appeal.

DECISION

The Hon'ble Tribunal observed that for registration of firm an application had to be made u/s 184 and the procedure to be followed on receipt of that contained in Sec. 185. At that relevant point of issue the application had to be made as per Rules 22 to 24 of the Income-tax Rules, 1962. As per these rules the application had to be made in Form No. 11, the firm to be evidenced by instrument of partnership deed and that the partnership should have been valid and genuine and should be constituted as specified in the instrument. In the case of the assessee it was not disputed that the firm was validly constituted. The dispute was only with regard to the distribution of the profits, which as per department, was not made as per the shares specified in the partnership deed. In form No. 11 the firm had to give a certificate that the profit and loss, if any, was divided or credited as shown in the schedule. This apparently referred to the profit/loss which the partners agreed to share amongst themselves as specified in the deed. In the instant case, in the absence of any material to show that the profits belonging to the trust were actually agreed to be shared by the partners, it could not be said that the firm was not genuine. It was also not a case where any of the partners was benamidar of the other partner for which declaration in Form No. 11 was made. The Hon'ble Tribunal accordingly held the firm entitled to registration and reversed the order of CIT(A) and allowed the appeal of the assessee.

Cases referred to :

1. *Khanjan Lal Sevak Ram vs. CIT* (1972) 83 ITR 175 (SC)
2. *Shri Setha Ram Dhanvir Singh*
3. *Kanihya Lal Radha Krishan (All.)*
4. *CIT vs. Chander Bhan Hari Chand & Co.* (1980) 126 ITR 709 (Del.)

Full text of the Order is given below :

ORDER

(Miss Moksh Mahajan, A.M.)

The order of the learned Commissioner of Income-tax (Appeals) for assessment year 1982-83 whereby the order of the Assessing Officer passed under sec. 185(1)(b) whereby refusal of registration was confirmed, has been challenged by the assessee.

2. Shri C.S. Aggarwal who appeared on behalf of the assessee submitted that the assessee's claim for registration was refused on the ground that there was no genuine firm in existence for the various reasons as discussed in the assessment order passed under sec. 143(3) in the case of the assessee for the aforesaid assessment year. According to the Assessing Officer, it was the assessee who carried on wholesale business in sarees, the income of which was diverted to the trust M/s K.C. Dilip Kumar Pvt. Family Specific Trust. The learned CIT(A) on the other hand was of the view that the profits earned were not distributed in accordance with the constitution so specified in the deed of partnership. This was for the reason that the income shown in the hands of the trust was held to belong to the assessee firm. Another reason stated for disallowing the claim of registration was that the part of the profits was not divided or credited in the manner shown in the Application Form No. 11. This was supported by the decision of the Supreme Court in the case of *Khanjan Lal Savek Ram vs. CIT* (1972) 83 ITR 175. In fact, argued the learned A.R., the profits shown in the hands of the trust belonged to it and as such were not assessable in the hands of the assessee firm. The decision of the Supreme Court in the case of *Khanjan Lal Savek Ram* (supra) was delivered under the old Act, 1922 where the provision were different from that of Act, 1961. Apart the aforesaid case pertained to renewal of registration and not the fresh registration as is the case of the assessee. As per the provisions of sections 184 and 185 there is no requirement for the profits to be distributed as per the ratio laid down in the partnership deed. What is required is that the firm is validly constituted and is genuine. As there is no conclusive evidence to show that the firm was not genuine, the registration was wrongly refused. In support the reliance was placed on various case laws.

3. The learned Departmental Representative on the other hand, heavily supported the order of the CIT(A). It was argued that it was proved beyond doubt that the income shown in the hands of the trust actually belonged

to the assessee firm and as such the entire profits were not distributed as per the share ratio specified in the partnership deed. Considering that this was the year of initial registration, the Assessing Officer was well within his right to enquire into the genuineness of the firm and then refused the registration. The ratio in the case of *M/s. Khanjan Lal Sevak Ram* (supra) squarely applies to the case of the assessee whereas the other cases cited are distinguishable. In the circumstances there is no merit in the arguments of the learned AR that the assessee's claim for registration was wrongly rejected. Various decisions were relied upon.

4. We have considered the rival submissions. Examining the assessee's claim under the 1961 Act, we find that a firm may be assessed as registered or to be treated as unregistered one. An application for registration is to be made under sec. 184 and the procedure to be followed on receipt of application is contained in section 185 of the Act. As per the provisions prevailing at the relevant point of time, the essential conditions are — (a) an application to be made on behalf of the firm. This has to be as per Rules 22 to 24 of the Income-tax rules, 1962. As per these rules, the application has to be filed either in Form No.11, Form No. 11A or Form No. 12A as the case may be, for registration or for continuation of registration; (b) the firm is to be evidenced by instrument of partnership deed; & (c) partnership is to be valid and genuine and should be constituted as specified in the instrument.

5. In the case of the assessee it is not disputed that the firm is validly constituted. The dispute is only with regard to the distribution of the profits which according to the department, have not been made as per the shares specified in the partnership deed. In this context we find that while section 184 speaks of the individual shares of the partners being specified in the instrument, section 185 talks of the power of the Assessing Officer to enquire into the genuineness of the firm. Form No. 11 which is relevant in the case of the assessee requires the following declaration to be made by the partners —

> "3. We hereby declare that none of the partners of the firm was, at any time during the previous year* upto the date of this application, in relation to the whole or any part of his share in the income or property of the firm, a benamidar of any other partner to whom he is not related as spouse or minor child.
>
> 4. We do hereby certify that the profits (or loss, if any) of the previous year were/will be
>
> period upto the date of dissolution were/will be
>
> divided or credited as shown in the schedule and that the information given above and in the Schedule is correct.
>
> *Note : Where the application is made after the end of the previous year, the words 'upto the date of this application' must be deleted."

Similar certificate was prescribed in paragraph 3 of the form of application for registration prescribed under Rule 3 of the Income-tax Rules, 1922. From the above it is clear that the certificate to be given by the firm is that the profit or loss, if any, is divided or credited as shown in the schedule. The schedule in turn contains 7 columns out of which the 6th column which is relevant reads as under —

"Share in the balance of profits or loss"

"Percentage".

This apparently refers to the profits/loss which the partners agreed to share amongst themselves as specified in the deed. As the reliance has been mainly placed on the decision of the Supreme Court in the case of *Khanjan Lal Sevak Ram* (supra), we would refer to the same. The aforesaid case related to renewal of registration for assessment year 1948-49 under sec. 26A of Indian Income-tax Act, 1922. The firm which constituted of 6 partners was registered for assessment year 1947-48. It applied for renewal of registration for assessment year 1948-49. On November 5, 1949, the firm was dissolved under the Deed of dissolution dated November 9, 1949. One of the clauses in the deed provided as under —

"But if an amount which was not entered in the books at the time of settlement is found then only that person will be accountable for it through whom the money was received or paid. None of the parties will have any objection to it."

The first four partners made disclosure statement to the Income-tax Officer that the firm had earned Rs. 15,000/- by way of profits outside the books. It was also stated that the entire profits were not recorded in the books. On these facts the ITO rejected the assessee's claim for registration which order was upheld by the Appellate Asstt. Commissioner. There being a difference amongst the Members of the ITAT. It was referred to the Third Member who agreed with the Judicial Member that the firm was not entitled to renewal of registration. When it came to the Supreme Court, their Lordships of Supreme Court held that as the firm gave wrong certificate that the profits earned by the firm had been divided or credited in the manner shown in the application, the assessee was not entitled to renewal of registration. This was for the reason that it did not comply with the conditions prescribed in paragraph 3 of Rule 6. While holding so, it was also held that the reason behind Rule 6 was that at the relevant time the registered firm was not taxable and only the partners of the firm could be taxed. If a portion of the profits earned by the firm was not divided amongst the partners or credited to their accounts to that extent, the profits earned by the firm escaped assessment and as such the claim for renewal of registration could not be accepted. While holding so they allayed the apprehension of the learned AR regarding the decision being taken advantage of by observing that in the cited decision it was only the scope of paragraph 3 of Rule

6 which was examined. "So long as the divisible profits had been divided or had been credited to the accounts of the partners, the requirement of that provision was complied with." Thus while in the aforesaid case it was admitted by the partners that there were secret profits which were not shared amongst all the partners as per terms of dissolution deed, in the case of the assessee there is no such thing. All along the line the assessee has not admitted that the income pertaining to trust belonged to it which was agreed to be shared amongst the partners of the firm in the ratios laid down in the deed. In this context we would like to state that the order passed under sec. 185 is a separate and independent from the order passed under sec. 143(3) of the Act. While one affects the tax to be recovered from the firm, the other relates to the computation of the taxable income. Both are independent to each other determining different subject matters.

6. As regards the other cited cases, in the case of *Shri Setha Ram Dhanvir Singh* (supra) the shares were divided at variance with the ones specified in the instrument of partnership. So facts are distinguishable. In the case of *Kanhiya Lal Radha Krishan* (supra), it was found by the Assessing Officer that the assessee carried on two undisclosed businesses at two more places, the profit of which was not shown by it. On the facts it was held by their Lordships of Allahabad High Court that the certificate given in clause 3 of the application was incorrect which was deliberate and dishonest on the part of the assessee. Accordingly the claim of the registration was refused. As against this, we find that in the case of *CIT vs. Chander Bhan Hari Chand and Co.*, (1980) 126 ITR 709 (Del.) their Lordships of Delhi High Court have held that even if some partners had made secret profits without the knowledge of the others, the firm was entitled to the certificate of continuance of registration under sec. 184(7). It must also be found that the other partners have assented to such a distribution. Though the decision pertains to the provisions of sec. 184(7), the ratio is relevant. Their Lordships of Delhi Court also discussed the decision of the Supreme Court in the case *Khanjan Lal Sevak Ram* (supra). While arriving at the conclusion they also referred to the observations of their Lordships of Supreme Court made at page 182 of the aforesaid 83 ITR wherein the apprehension expressed by the counsel for the assessee were allayed. In any case as stated above, in absence of any material to show that the profits belonging to the trust were actually agreed to be shared by the partners, it could not be said that the firm was not genuine. It is also not a case where any of the partners is benamidar of the other partner for which the declaration in Form No. 11 was made. In the circumstances, we hold that the firm is entitled to registration and as such we reverse the order of the learned CIT(A) in this respect.

7. In the result, the appeal is allowed.

(1995) 126 Taxation 122 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH, JAIPUR
(Before Shri M.A.A. Khan and Shri Pradeep Parikh)
ITA No. 1172/JP/1991
(Assessment Year 1988-89)

Income-tax Officer

vs.

Shri Tek Chand, Prop. Ashoka Hotel, Suratgarh

For the Appellant	:	**A.K. Singh**
For the Respondent	:	**O.P. Aggarwal and I.N. Bhatnagar**
Decided on	:	22-11-1994

UNEXPLAINED INVESTMENT — Assessee showing cost of construction of Hotel Building at Rs. 2.55 lakhs - ITO making reference to DVO who estimating the cost at Rs. 3,80,225 — ITO adding difference Rs. 1,25,225 as unexplained investment — CIT(A) holding no defect pointed out in accounts maintained by assessee for cost of construction — Also Regd. Valuer estimated cost at state P.W.D. rates while DVO valued the cost at CPWD rates — Addition deleted — Held, CIT(A) justified — Also application of PWD rates was quite logical in Rajasthan state as conferred to CPWD rates.

Income-tax Act, 1961 — Sections 69.

Indian Evidence Act, 1872 — Section 34.

FACTS

After demolition of the old structure, the assessee started the construction and renovation of the Hotel building in March 1986 & completed the same in July, 1987. The assessee allegedly maintained a complete record, on day to day basis, of all the expenditure incurred on demolition, construction and renovation. Such expenditure shown was Rs. 2,55,000. The ITO made a reference to the DVO and the latter estimated the same at Rs. 3,80,225. The ITO thus treated the difference of Rs. 1,25,225 as unexplained investment and made the addition u/s 69 of the Act. In appeal the CIT(A) pointed out that the rejection by the Assessing Officer of Building Construction account without pointing out any specific defect was unjustified when the estimate of the Regd. Valuer was based on the standing order of the PWD of the State of Rajasthan and the same was acceptable in preference to that made by the DVO on the basis of CPWD rates. The addition was thus deleted. The revenue filed a second appeal.

DECISION

As per section 34 of the Indian Evidence Act, 1872, the entries in the

books of account regularly kept in the course of business are relevant when they refer to a matter into which the court has to enquire but such statements shall not alone be sufficient to charge any person with liability. Such statements no doubt are not conclusive proof of the matters admitted but may operate as estoppel against the maker. The possible use of such statements attaches the degree of credibility to them and enhances their probative value. Therefore whenever such statements are relied upon to prove the existence of a fact they are required to be considered in right perspective and should not be lightly ignored or rejected. In the instant case the AO had not found any specific defect in the accounts for expenditure so maintained and as such the AO was not justified in rejecting such specific record of expenditure particularly when such account got good collaboration from the opinion of expert (Regd. Valuer). Further, CPWD rates, applied by the DVO, are general in their nature and purpose in view of the wide area of their applicability while the state PWD rates take into account special conditions in a particular area in the territories of Rajasthan viz availability of cost of construction material, labour and wages to be paid to them etc. etc. Therefore it would be logical to follow the PWD rates in Rajasthan state. CIT(A) order was thus confirmed and the revenue's appeal dismissed.

Cases referred to :

1. *Digvijay Textile Mills* ITA Nos. 462/464/JP/1981
2. *ITO vs. Prakash Chand Surana* ITA No. 164/JP/77-78
3. *Shash Pd. Heda vs. ITO* ITA No. 370/JP/77-78

Full text of the Order is given below :

ORDER

(M.A.A. Khan, J.M.)

This is an appeal by Revenue from the order dated 27-3-1991 whereby the CIT(A), Jodhpur deleted an addition of Rs. 1,25,225/- representing the difference between the cost of construction of a Hotel building as per books of account of the assessee and that estimated by the Assessing Officer (A.O.) on the basis of the report of Departmental Valuation Officer (DVO).

2. The assessee owns a building at Suratgarh, Distt. Sri Ganganagar and derives business income from running a hotel called Ashoka Hotel therein. According to the assessee after demolition of the old structure the construction and renovation of the building in question was started in March, 1986 and completed in all respects in the month of July, 1987. He had allegedly maintained a complete record, on day to day basis, of all the expenditure incurred on the demolition, construction and renovation of the hotel building. On the basis of such record the position of expenditure incurred came to the following :-

Old cost upto 31-3-1986	Rs.	47,000.00

Exp. during 1986-87	Rs. 1,83,000.00
Exp. during 1987-88	Rs. 25,000.00
	Rs. 2,55,000.00

3. As per itemwise details of the expenditure incurred on the construction of the hotel building, the cost of construction came to Rs. 2,08,000/- which was reflected in the regularly maintained books of accounts of the assessee.

4. The assessee declared the cost of construction of the hotel building at Rs. 2,08,000/- as per his books of accounts. This declaration was also supported with the report of Shri R.N. Goyal, a registered valuer, dated 3-2-1987. Shri Goyal had estimated the cost of construction at Rs. 2,07,803. The Assessing Officer did not accept the cost of construction as declared by the assessee and called for the advisory report from the DVO. The DVO in his first report dated 23-6-1988 estimated the cost of construction at Rs. 4,11,000/- but on second reference, necessitated on assessee's objection, he estimated such cost at Rs. 3,80,225/- vide his report dated 2-3-1990. The Assessing Officer accepted second report of the DVO and therefore considered the difference between the cost of construction as shown by the assessee in his books at Rs. 2,55,000/- and that estimated by the DVO at Rs. 3,80,225/- as representing the unexplained investment by the assessee in the construction of the hotel building. He accordingly made an addition of Rs. 1,25,225/- u/s 69 of the IT Act, 1961 (the Act) to the total income of the assessee.

5. In appeal, however, the learned CIT(A) examined the issue in sufficient detail and held that rejection by the A.O. of the building construction account in the books of the assessee without pointing out an any specific defect was unjustified and that since the estimate made by the Regd. Valuer was based on the standing order of the Public Works Department (PWD) of the State of Rajasthan, the same was acceptable in preference to that made by the DVO on the basis of Central Public Works Department (CPWD) rates. The learned CIT(A), therefore, deleted the addition in question giving thereby rise to the present appeal before the Tribunal.

6. The learned Departmental Representative urged that since the estimation made by the AO of the cost of construction was based on the report of an expert of the subject, the same should not have been disturbed by the learned CIT(A), particularly when the expert opinion was based on more scientific method approved by the CPWD than that adopted by the Regd. Valuer in his report. It was also submitted by the learned Departmental Representative that the AO had rightly rejected the case of construction account as maintained by the assessee.

7. On the other hand Shri O.P. Aggarwal, CA, the learned counsel appearing for the assessee, supporting the order under appeal submitted that since the A.O. had found no particular and specific defects in the building account

in the books of the assessee, he was not at all justified in rejecting the same. The learned counsel further submitted that the Tribunal has all along approved of the method of estimating the cost of construction of immovable properties in Rajasthan as per guidelines in X-3 standing orders of the PWD of the State. In this behalf the learned counsel referred to the several decisions of Jaipur Bench referred to by the learned CIT(A) in his order.

8. We have given thoughtful consideration to the arguments advanced on behalf of the parties and after taking into account the material on our record we entertain no doubt that the issue involved in this appeal has been decided by the learned CIT(A) on correct lines and in conformity with the consistent view of the Tribunal.

9. Section 34 of the Indian Evidence Act, 1872 makes entries in the books of account relevant in judicial proceedings. The said section says that entries in the books of account, regularly kept in the course of business, are relevant when they refer to a matter into which the Court has to enquire but such statements shall not alone be sufficient evidence to charge any person with liability. The necessary requirements for availing the benefit of this provision are that the entries should have been made in the books of account, that such books of account have been regularly kept in the regular course of business and that such entries refer to a matter being enquired into by the Court. But such entries would not by themselves fasten a liability on the other. The statements made through such entries are in the nature of admission of certain facts by a person which no doubt are not conclusive proof of the matters admitted but may operate as estoppel against the maker and may be proved against him. The possible use of such statement against the maker thereof attaches the degree of credibility to them and enhances their probative value. Therefore, wherever such statements are relied upon to prove the existence of a fact they are required to be considered in right perspective and should not be lightly ignored or rejected. It is in conformity with this fundamental principle of law of evidence that it is by now well established that the account of construction of a building maintained by a person in the regular course of business should be given due weight and not be rejected without finding specific defects therein. Such account becomes all the more credible and reliable if the same is reflected in the regularly kept books of account pertaining to the business being carried on by him and also gets some collaboration from other independent evidence.

10. Judged in the light of the principles highlighted above the position in the instant cases comes to this. The assessee had admittedly kept a record of the expenditure incurred on the construction of the hotel building over the years. Such record was duly supported with relevant vouchers and contained the detailed particular of the item wise expenditure on day to day basis. The expenditure had duly been reflected in the account books regularly maintained by the assessee in the course of his business. On scrutiny

the A.O. might have found some defect in the account relating to sales but no specific defects in the account maintained for expenditure incurred on the construction/renovation of hotel building was pointed out by him. Under such circumstances the AO was certainly not justified in rejecting such specific record of expenditure and relying upon estimation of such cost by an expert person, particularly when the account of construction submitted by the assessee got good corroboration from the opinion of other similar expert. In our opinion the issue in the point has rightly been decided by the learned CIT(A) and, therefore, ground no. 1 is dismissed.

11. Now coming to the subject matter of the other ground it may be stated at the very outset that whereas the DVO had made the CPWD rates as basis of his estimation of the cost of construction, the Regd. Valuer had made the standing order of the PWD Rajasthan as basis of his estimation. The PWD rates might be having a more scientific approach as their basis than that adopted by the State PWD. But it needs to be appreciated that whereas the CPWD rates are general in their nature and purpose in view of the wide area of their applicability,the State PWD rates take into account the special conditions in a particular area in the territories of Rajasthan State. The availability and cost of construction material, the availability of labour and wages to be paid to them and other like factors do affect the cost of construction and, therefore, it is quite logical for the person concerned to follow the State PWD rates while estimating the cost of construction of buildings in different areas in the territories of Rajasthan State. Such an approach has consistently been adopted by the Jaipur Bench of the Tribunal in similar other cases, which have been referred to by the learned CIT(A) in his order viz.,—

1. *Shashu Pd. Heda vs. ITO, Ajmer* ITA No. 370/JP/77-78.
2. *ITO vs. Prakash Chand Surana* ITA No. 164/JP/77-78
3. *Digvijay Textile Mills.* ITA Nos. 462/464/JP/1981

There is thus no force in ground no. 2 either.

12. In the result, the appeal is dismissed.

(1995) 126 Taxation 127 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH

(Before Shri R.K. Ball and Shri N.K. Agrawal)

ITA Nos. 361 & 362/Chandi/1990

(Assessment Years : 1984-85 and 1985-86)

Asstt. Commissioner of Income-tax, Circle II (1), Ludhiana

vs.

M/s Mohini Hosiery Mills, Ludhiana

For the Appellant	:	**K.S. Negi**
For the Respondent	:	**H.O. Arora**
Decided on	:	15-2-1995

BUSINESS DEDUCTIONS — PAYMENT OF RENT MADE TO HOTE ON ACCOUNT OF HIRING SPACE FOR CONDUCTING THE EXHIBITION SALES WAS NOT TO BE CONSIDERED FOR WORKING OUT DISALLOWANCE U/S 37(3A).

Assessee making payment of rent to a hotel for conducting sale exhibition — A.O. considering the payment for working out the disallowance u/s 37(3A) — CIT(A) directing for exclusion o payment for the purpose — CIT(A)'s order upheld.

Income-tax Act, 1961 — Section 37(3A).

FACTS

The assessee was running a hosiery mills at Ludhiana. It held an exhibition sales at Delhi and for the purpose it hired a space at a hotel premises. The payment made by the assessee to the hotel was taken into consideration by the Assessing Officer for the purpose of workin out the disallowance u/s 37(3A). On appeal by the assessee, the CIT(A) directed for excluding the same. The Revenue filed a second appeal.

DECISION

The payment made to hotel at Delhi was for purposes of hiring the propert for conducting sales exhibition and it was not a payment made to hotel for purposes of boarding or lodging of either the customers or the employees of the assessee. Therefore the payment of rent to the hotel on account of hiring space for conducting exhibition sales was not to be considered for purposes of working out the disallowance u/s 37(3A) of the Act.

The appeal filed by the Revenue was thus dismissed.

Full text of the Order is given below :

ORDER

(R.K. Ball, A.M.)

These two appeals by the Revenue involve similar issues and are, therefore,

disposed of by a common order for the sake of convenience. ITA No. 361/ Chandi/1990 relates to the assessment year 1984-85 and is against the order dated 20-12-1989 passed by the CIT(A)-I, Jalandhar. ITA No. 362/ Chandi/1990 relates to assessment year 1985-86 and is against the order dated 20-12-1989 passed by the CIT(A)-I, Jalandhar.

2. The common ground taken by the Revenue in both these appeals is that on the facts and in the circumstances of the case, the learned CIT(A) has erred in directing the Assessing Officer that the payment made by the assessee to hotel on account of rent should be excluded for purposes of working out the disallowance u/s 37(3A) of the Income-tax Act, 1961.

3. We have heard the rival submissions and have also perused the orders passed by the Assessing Officer as well as the learned CIT(A). The payment made to hotel at Delhi was for purposes of hiring the property for conducting sales exhibition and it was not a payment made to the hotel for purposes of boarding or lodging of either the customers or the employees of the assessee. In this view of the matter, we are in agreement with the view of the learned CIT(A) that the payment of rent to the hotel on account of hiring space for conducting the exhibition sales is not to be considered for purpose of working out the disallowance u/s 37(3A) of the Act. Accordingly we uphold the order of the learned CIT(A) in this regard and dismiss both the appeals filed by the Revenue.

(1995) 126 Taxation 128 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

JAIPUR BENCH, JAIPUR

(Before Shri M.A.A. Khan & Shri Pradeep Parikh

ITA No. 152/JP/91

(Assessment Year 1985-86)

The WTO, Ward II, Bikaner

vs.

Sh. Surinder Kaur, Rampuria

For the Appellant	:	**S.P. Singh**
For the Respondent	:	**H.K. Ojha**
Decided on	:	15-12-1994

WEALTH TAX — Deduction of liability for borrowed funds utilised in the acquisition of exempted assets — DC(A) allowing relief on the ground that similar claim had all along been allowed in the past by the Assessing Officer — Held, no nexus between the liability and exempted assets was specifically established in the year under appeal — Revenue's appeal dismissed.

Wealth-tax Act, 1957 — Section 2(m) read with section 5(1A).

FACTS

In the WT assessment of the assessee for the A.Y. 1985-86, the Assessing Officer had not allowed the deduction for the full amount of liability representing borrowed funds utilised in the purchase of shares which were exempt from wealth tax. He had also disallowed liability and loans obtained by the assessee from LIC on the ground that the same were against the exempted assets. The DCWT(A), however, allowed the entire liability claimed by the assessee. The Revenue filed a second appeal.

DECISION

It was observed that assessee's similar claim had all along been allowed in the past. In view of the state of affairs and long standing position of the parties it was held that DCWT(A)'s order was not to be disturbed particularly when no nexus between the liability and the exempted asset was specifically established in the year under appeal. The appeal filed by Revenue was accordingly dismissed.

Full text of the Order is given below :

ORDER

(M.A.A. Khan, J.M.)

The grounds raised in this appeal by Revenue from Dy. CWT(A)'s order dated 10-1-1991 for A.Y. 1985-86 read as under :-

> "On the facts and circumstances of the case the DC(A) erred in directing to allow deduction of full liability representing borrowed funds utilised in purchase of shares ignoring the fact that shares were exempt from WT and as such no liability against the exempted asset was admissible under the WT Act and thus relief allowed is not justified;
>
> (ii) erred in directing to allow liability of Rs. 8000/- and loans of Rs. 37,942/- from LIC on the ground that these liabilities are not against the exempted assets ignoring the fact that in the balance-sheet, these liabilities appeared against exempted assets and as such no further evidence was required to establish the nexus of these liabilities against the exempted assets."

2. Heard the parties.

3. We find that the ld. DCWT(A) in his order dated 12-8-1992 passed in assessee's case for A.Y.1986-87 has observed that assessee's similar claim for liability has all along been allowed in the past. For A.Y. 1987-88 the WTO himself has allowed such liability in the computation of assessee's net wealth. This position between the parties is not challenged by Revenue. No distinguishing features so as to take another view of the matter this year were brought to our notice. No change in law or in fact was asserted either. In view of this state of affairs and long standing position of the parties,

we do not feel inclined to disturb the order under appeal particularly when no nexus between the liability and the exempted asset is specifically established in this year.

4. In the result the appeal is dismissed.

Tribunal Decisions

(1995) 126 Taxation 131 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR
(Before Shri R. Swarup and Shri H.C. Shrivastava)
R.A. Nos. 1-4/Jab/1993 in ITA Nos. 331-334/Jab/1992
Assessment Years 1988-89, 1989-90 & 1990-91

The Commissioner of Income-tax
vs.
M/s. K.M. Wadhwani, Contractor, Satna

For the Appellant	:	**M.R. Iqbal**
For the Respondent	:	**B.K. Nema**
Decided on	:	17-2-1994

REFERENCE — Revenue referred various questions of law in four Reference Applications — Tribunal finding tax effect in all these application below Rs. 30,000/- — Held, in view of Board's circulars and revenue effect being less than Rs. 30,000/- no reference necessary and applications dismissed.

I.T. Act, 1961 — Section 256.

Board's Circulars Instruction No. 1573 F.No. 279/26/83 ITJ dt. 12-7-1984 and Instruction No. 1764 (CBDT Circular F. No. 319/11/87 dt. 14-7-1987)

FACTS & DECISION

In the four reference applications filed by the Revenue various questions of law were involved. However, the Hon'ble Tribunal found that in all the four applications tax effect was less than Rs. 30,000/-. In CBDT's instructions No. 1573 and 1764 the CBDT had taken a policy decision that where tax effect was less than Rs. 30,000/- no reference was necessary to be made, before the High Court or Supreme Court. Hence applications were dismissed by the Tribunal

Case referred to :

CWT vs. Executors of late D.T. Doshi (1991) 189 ITR 319 (Bom.)

Full text of the Order is given below :

ORDER

(R. Swarup, J.M.)

The Commissioner of Income-tax, Jabalpur has made these reference applications under section 256(1) of the Income-tax Act, 1961 and has proposed the following questions of law stated to be arising out of the orders

of the Tribunal dated 14th October, 1992 in ITA Nos. 331 to 334/Jab/1992 for the assessment years 1988-89 and 1989-90 to refer the same for the opinion of the Hon'ble High Court of Madhya Pradesh at Jabalpur. The question of law proposed in R.A. Nos. 1 and 2/Jab/ 1993 for the assessment years 1988-89 and 1989-90 are as under :-

"1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law to infer that Assessing Officer failed to examine from his record as to whether the income in any of the three immediately preceding years exceeded Rs. 25,000 or not simply because there was no mention of such facts in the penalty orders when the records undisputedly indicated the fact of assessee having disclosed income much in excess of Rs. 25,000 and also that assessee never disputed these facts?

2. Whether the Tribunal was justified in law to old that failure on the part of Assessing Officer to verify the income/gross receipts of any of the three immediately preceding years did not justify the levy of penalty when facts on record fulfilled the condition for levy of penalty in this regard ?

3. Whether the Tribunal was justified in law to hold that provisions of section 271A as they stood prior to 1-4-1989 were applicable to the facts of the case for asst. year under consideration in view of facts and circumstances of the case?"

The questions of law proposed in R.A. Nos. 2 and 4/Jab/1992 for the assessment years 1988-89 and 1989-90 are as under :-

"1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law to admit additional argument of the assessee to the effect that calculation of interest chargeable under sec. 201 (1A) was incorrect?

2. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law to direct the Assessing Officer to calculate the interest under section 201(IA) from the date when the tax was deductible at source (by assessee from receipts of sub-contractor) to the date on which the assessee paid self-assessment tax or advance-tax or TDS against his (assessee's) receipts were made by assessee's contract awarding authority?"

2. We have considered the submissions of the parties and have gone through the entire material placed before us. At the very outset, it was found that the tax effect for both the assessment years in all the four reference applications is below Rs. 30,000/-. As such, relying upon the Board's instruction No. 1573 issued by the Central Board of Direct Taxes vide Circular F.No. 279/26/83-ITJ dated July, 12, 1984 and instruction No. 1764 issued by the CBDT vide circular F.No. 319/11/87-WT dated July,

14, 1987 where the tax affect is less than Rs. 30,000/-, the Board has taken a policy decision not to raise questions of law with a view to reduce litigations before the High Court and Supreme Court. We find that the Hon'ble Bombay High Court by their decision in the case of *CWT vs. Executors of late D.T. Udeshi*, (1991) 189 ITR 319 have noted these circulars and have held that no reference application can be filed under such circumstances. In view of the above, the reference applications filed by the department are dismissed.

(1995) 126 Taxation 133 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD BENCH 'B' SMC, ALLAHABAD
(Before Shri R.D. Agrawalla, Judicial Member)
ITA No. 728 (All.) of 1992
(Assessment Year 1989-90)

M/s Miri Lal Mulk Raj

vs.

Income-tax Officer

For the Appellant	:	**S.K. Agrawal**
For the Respondent	:	**B.C. Singmure**
Decided on	:	15-12-1994

PENALTY — Income of assessee exceeding Rs.25,000 and turnover Rs. 2,50,000 — Not maintaining books of account — ITO levying penalty u/s 271A, Rs. 5,000 — Penalty reduced to Rs. 3,000 in first appeal — Held, not necessary to mention in the order about initiation of penalty proceedings u/s 271A — Income & turnover being in excess of the limits, penalty attracted — Penalty reduced to Rs. 2,000, the minimum.

Income-tax Act, 1961 — Sections 44AA & 271A.

FACTS

Assessee filed his return of income showing income of Rs. 45,000/-. Further as per reply of the assessee this income was estimated by applying 15% profit on the sale price. Thus both the income and turnover exceeded the limit laid down in section 44AA of the Act. Since the books of accounts were not maintained Assessing Officer imposed penalty of Rs. 5,000/- on the assessee u/s 271A of the Act. In first appeal it was reduced to Rs. 3,000/-. The assessee filed second appeal and pleaded that penalty proceedings were not initiated during the course of assessment proceedings etc.

DECISION

The Hon'ble Tribunal pointed out that the legislature intent is manifest by the plain readings used in sec. 271-A or for that matter also sec.

271-B on the one hand and on the other provisions such as section 271 of the Act. While in the latter case penalty is initiable only in the course of any proceedings, such an embargo did not apply to the former group of cases. The Hon'ble Tribunal further noted that the assessee had shown its income at Rs. 45,000/- and as per reply of the assessee to the notice of the Assessing Officer the income was estimated by applying 15% profit on sale price. Thus although the two conditions about the income and turnover appearing in sec. 44AA were exclusive of each other and not conjunctive but in the case in hand both of them existed and penalty was attracted. This was however reduce to the minimum viz Rs. 2,000/-.

Full text of the Order is given below :

ORDER

(R.D. Agarwalla, J.M.)

This is an appeal by the assessee which challenges the levy of penalty on it u/s 271-A of the Income-tax Act, 1961 in a sum of Rs. 5,000/- by the Assessing Officer, reduced to Rs. 3,000/- during first appeal.

2. The learned authorised representative for the assessee contended before me that, firstly, the Assessing Officer failed to express his intention of initiating penalty in question in the assessment order and, secondly, the turnover of the assessee also did not exceed Rs. 2,50,000/- as contemplated by clause (ii) of sub-sec. (2) of sec. 44-AA of the Act and as such penalty was not tenable.

3. The learned Departmental Representative, (sic) submitted that unlike certain other provisions such as sec. 271 of the Act, penalty was not necessarily required to be initiated by the Assessing Officer "in the course of any proceedings under this Act". This meant, it was contended, that penalty u/s 271-A has also u/s 271-B could be initiated even on the assessment made by the Assessing Officer on an assessee.

4. Patently this submission carries force. The legislative intent is manifest by the plain wordings used in Sec. 271-A or, for that matter also sec. 271-B on the one hand and, on the other, provisions such as sec. 271 of the Act. While in the latter case penalty is initiable only in the course of any proceeding under the Income-tax Act, such an embargo does not apply to the former group of cases. The objection taken by the assessee is, as such, overruled.

5. Coming to the other plea taken by the learned authorised representative for the assessee on the turnover aspect, it may be stated that clause (ii) of sub-sec.(2) of sec. 44-AA of the Act read as under at the relevant time:

> "(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed twenty five thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed two hundred and fifty thousand rupees, during such previous year."

6. The provision of law clearly conveys that it would be applicable in any of the two situations, firstly, where the income of the assessee was likely to exceed Rs. 25,000/- and, secondly, where his total sales, turnover or gross receipts were to exceed Rs. 2,50,000/-. Incidentally both the situations in this case existed. The assessee showed its income at Rs. 45,000/- as is evident from the computation sheet submitted by it. Further, as per reply of the assessee to the notice issued to them u/s 139(9) of the Act, this income was estimated by applying 15% profit on the sale price. The Department is, therefore, correct in submitting that on working the gross receipts of the assessee would thus come to Rs. 3 lacs.

7. It may thus be seen that although the two conditions about the income and the turnover appearing in sec. 44 AA(5)(ii) of the Act are exclusive of each other and not conjunctive, in the case in hand both of them existed.

8. The plea of the assessee thus fails on this account also.

9. However, the penalty is reduced to the minimum level of Rs. 2,000 from Rs. 3,000/-.

10. The appeal is partly allowed.

(1995) 126 Taxation 135 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'SMC' DELHI

(Before Shri R.M. Mehta, Accountant Member, S.M.C.)

ITA No. 3770 (Del.) of 1992

(Assessment Year 1985-86)

Hanumanji Charitable Trust
N-102 Panchsheel Park, N. Delhi
vs.
A.D.I (Exemption) Trust Circle - 2

For the Appellant	:	**K.P. Bhatnagar,**
For the Respondent	:	**M.K. Jha, DR**
Decided on	:	30-11-1994

PENALTY — Assessee adopting mercantile system of Accounting — Changed the system to cash method during the year — On this basis filing return showing deficit of Rs. 700/- in response to notice u/s 148 — Assessing Officer computing income of Rs. 41,320 on mercantile basis and issuing notice u/s 271(1)(a) — Imposing penalty of Rs. 13,620 — DC (Appeals) confirmed the penalty order — Held, assessee deliberately avoided to file the return in time — Penalty order confirmed — Appeal dismissed.

Income-tax Act, 1961 — Sections 148 and 271(1)(a).

FACTS

The assessee had been adopting earlier mercantile system of accounting. In response to notice u/s 148 issued on 18-11-1987, the assessee filed its return showing deficit of Rs. 700/- plus agricultural income of Rs. 3,056/- on 4-1-1988. The figure of deficit had been arrived at after adopting the cash system of accounting during this year. During the course of assessment proceedings the Assessing Officer noted that the funds had been invested in the debentures of Pvt. Ltd. Cos. which were controlled by the Trustees and their relatives. Some deposits were also made in such Cos. The A.O. also noted the absence of steps to recover the amount of interest which had been duly credited and become due to the assessee. For all these reasons the A.O. rejected the claim of the assessee for change of accounting method from mercantile to cash and computed the income on mercantile basis holding that the method of accounting was changed to avoid incidence of tax on interest receivable on accrual basis. Since the return had been filed late the A.O. also issued a notice u/s 271(1)(c) and imposed penalty of Rs. 13,620/-. The DC (Appeals) confirmed the penalty order. The assessee filed second appeal.

DECISION

On facts the Hon'ble Tribunal held that the assessee had deliberately avoided to file the Income-tax return in time which subsequently came to be assessed and confirmed by the Tribunal was the true and correct income which was above the taxable limit and a return thereof was required to be filed by the due date as stipulated in the I.T. Act, 1961. The penalty order u/s 271(1)(a) was thus confirmed and the appeal filed by the assessee dismissed.

Cases referred to :

1. *Reform Flour Mills Pvt. Ltd. vs. CIT* 114 ITR 227 (Cal.)
2. *Snow White Food Products Co. Ltd.* 141 ITR 847 (Cal.)
3. *CIT vs. Ganga Charity Trust Fund* 162 ITR 612 (Guj.)
4. *Jama Bhagat Public Charitable Trust* (Del.) 26-11-1993
5. *CIT vs. Corporation Bank Ltd.* (1988) 174 ITR 616 (Kar.)

Full text of the Order is given below :

ORDER

This appeal is directed against the order passed by the DC (Appeals) whereby he has confirmed a penalty of Rs. 13,620/- imposed on the assessee by the Income-tax Officer under section 271(1)(a).

2. The assessee in this case has been assessed in the status of an AOP on an income of Rs. 41,320/- as against return filed on 4th January, 1988 declaring a deficit of Rs. 700/- plus agricultural income of Rs. 3,056.

It would also be necessary to mention that the assessee at the first instance did not file a return of income, but only did so after a notice under section 148 had been issued on 18-11-1987 and served on the assessee on 3-12-1987. The further relevant facts of the case are that upto the assessment year 1984-85 the assessee had been maintaining its books of accounts on the mercantile basis, but during the assessment year under consideration had changed the method from mercantile to cash and filed the return on the changed basis. It is also an accepted fact that in the course of the assessment proceedings, the Income-tax Officer rejected the changed method on the ground that it had been done with a view "to avoid incidence of tax on interest receivable on accrual basis." The Income-tax Officer further noted that the funds had been invested in the debentures of Pvt. Ltd. companies, which were controlled by the trustees and their relatives. He also took note of the fact that certain deposits had been made in private companies which once again were controlled by the trustees and their relations or other sister concerns. He also took note of the absence of steps on the part of the assessee to recover the amount of interest which had become due to it although the payees had made provision for interest in their accounts and had credited the interest to the interest payable account. The aforesaid views expressed by the Income-tax Officer led to an addition of Rs. 43,656/- on account of "accrued interest". To conclude the sequence of facts, the Income-tax Officer initiated penalty proceedings under section 271(1)(a) for the late filing of the return and which ultimately came to be imposed in a sum of Rs. 13,620/. On further appeal the said levy of penalty came to be confirmed by the DC (Appeals) on the ground that the assessee's counsel could not give any satisfactory explanation for the delay in the filing of the return.

3. I have heard both the parties at some length in respect of the specific grounds raised in the assessee's appeal. The learned counsel made the following points :-

(i) That the return showing deficit of Rs. 700/- had been filed on the basis of the audited accounts which had earlier been filed with the Department on 26th June, 1985;

(ii) Even the return filed in response to notice under section 148 reflected the same figure of loss;

(iii) On the basis of the audited accounts the assessee was under the *bonafide* belief that the return need not be filed and the rejection of the changed method of accounting was a later event which was not contemplated by the assessee; and

(iv) That the same income which had been taxed in the assessment year under appeal had been included in the taxable income of the assessee in assessment year 1988-89.

4. The learned counsel also sought to draw a parallel between the present

case and that of another connected trust, namely, M/s. Jama Bhagat Public Charitable Trust which according to him had already been adjudicated upon by the Tribunal deciding in the ultimate analysis that penalty under section 271(1)(a) was not exigible. According to him the dates of filing the return, issue of notice under section 148 and the audited accounts reflecting the deficit were absolutely identical. A copy of the order of the Tribunal in ITA No. 123 (Del.) of 1992 (SMC) dated 26th November, 1993 was placed on record. The learned counsel took us through the relevant portions of the order of the Tribunal placing reliance on the same decisions as had been relied upon during the course of the hearing of that appeal and these being the ones reported in *Reform Flour Mills Pvt. Ltd. vs. CIT* (1978) 114 ITR 227 (Cal.); *Snow White Food Products Co. Ltd.* (1983) 141 ITR 847 (Cal.); and *CIT vs. Ganga Charity Trust Fund* (1986) 162 ITR 612 (Guj.). He concluded his arguments by urging that the penalty be deleted in line with the order of the Tribunal cited. The learned Departmental Representative, on the other hand, strongly supported the order passed by the DC (Appeals) contending in the process that in the present case the change in the method of accounting had not been found *bonafide* by the tax authorities and in that view of the matter, there was no valid basis on the part of the assessee's counsel to urge that penalty under section 271(1)(a) be cancelled. He placed reliance on the decision of the Karnataka High Court in the case of *CIT vs. Corporation Bank Ltd.* (1988) 174 ITR 616 (Kar.).

5. In reply the learned counsel for the assessee placed on record a copy of the order of the Tribunal in the quantum appeal as directed by us accepting that the Tribunal had been pleased to hold that the change in the method of accounting was not a *bonafide* one, but contending that think should not have effect on the penalty proceedings as the question of filing the return was to be seen in the light of the circumstances as existed at the relevant point of time and not subsequently. He reiterated reliance on the decision in the case of *M/s Jama Bhagat Public Charitable Trust* (supra).

6. I have considered the rival submissions and have also perused the material on record, to which my attention was invited during the course of the hearing. The decisions cited at the bar have also been duly considered. I may, at the outset, mention that the three decisions relied upon by the learned counsel were duly considered by the Tribunal in the quantum appeal viz. ITA No. 6484 (Del.) of 1989 dated 17th December, 1993, to which one of us (the Accountant Member) was a party. This is what the Tribunal observed after considering the aforesaid decisions and dealing with the arguments of both the parties : —

> "Submissions have been heard and record carefully perused. Assessee was receiving substantial interest income on its advances and investments in various concerns where, the persons controlling the assessee, were controlling the concerned companies wherefrom the interest was

receivable. The method of accounting upto the year under consideration was always mercantile. The attempt by the assessee to change the method of accounting was pure and simple to avoid the incidence of tax. The interest was said to have been allowed and recorded in the assessee's accounts with the concerns but the assessee never took steps to realise and collect the same. In the above circumstances the Assessing Officer came to the conclusion that the change was not being sought with a *bona fide* intention and that in fact attempt was to avoid the incidence of tax. The request was denied in the above circumstances. The learned first appellate authority confirmed such action. Now the issue for our consideration is as to whether the revenue authorities were justified to do what is seen to have been done in the present case. The facts and findings recorded in the orders of the revenue authorities are seen to be quite proper and correct. No proper reason was shown, on behalf of the assessee, that there was any mistake in the orders. It was not shown that the assessee's approach was *bonafide*. The mention, by the learned counsel, of assessment orders for other assessment years where cash system of accounting was said to have not been disturbed, cannot help the assessee because assessments upto assessment year 1988-89 were framed, without proper application of mind, under section 143(1) of the Act and for the assessment year 1990-91 there was not occasion for such discussion as no such issue was there before the Assessing Officer as the income shown was 'nil' . The ratios in the cases (supra) of *Reform Flour Mills (P) Ltd. and Snow White Food Products Co. Ltd.* do not appear to support the assessee's stand as facts and issues there were not in paramateria with the assessee's case. The ratio in the case (supra) *Ganga Charity Trust Fund* also cannot help the assessee as in that case the attempt to switch over was not found to be not *bona fide* whereas in the case before us the assessee's attempt is not *bona fide* as the assessee's purpose was to avoid the payment of legitimate taxes. For the above reasons and also for the reasons of the revenue authorities, with which we agree, we see no justification to interfere. The order under challenge on this point is confirmed."

7. It may be seen that the Tribunal has held on the facts of the present case that there was deliberate attempt on the part of the assessee to avoid the incidence and payment of legitimate taxes and the switch-over from one method of accounting to the other was not *bonafide*. The Tribunal also distinguished the decisions relied upon by the assessee's counsel primarily on the ground that in those cases it was not found that the change from one method to the other was not bonafide and this can also be said of the order passed by the Tribunal in the case of *M/s Jama Bhagat Public Charitable Trust* (supra). I may refer to para 2 of the aforesaid order where the Tribunal has categorically stated that the additions were made without

attracting the provisions of section 271(1)(c) whereas a perusal of the assessment order in the present case shows that such proceedings have been initiated. Then again there is no finding of the Tribunal in that case to the effect that the switching over from one system to another was not *bonafide*, whereas in the present case, the Tribunal has recorded such a finding while deciding the quantum appeal. The Tribunal has also gone on to say that the change-over was made with a view to avoid the payment of legitimate taxes. In the final analysis, I have no option, but to observe that the decisions of the various High Courts relied upon by the learned counsel do not come to his aid and to the same effect would be my observations in respect of the decision of the Tribunal in the case of the connected trust.

8. The natural consequence of the aforesaid discussion left me to no conclusion other than the one that the assessee has deliberately avoided the filing of the Income-tax return in time and the income which subsequently came to be assessed by the ITO and confirmed by the Tribunal was the true and correct income which was above the taxable limit and a return thereof requiring to be filed under the law by the due date stipulated in the Income-tax Act, 1961. In this view of the matter, the action of the tax authorities in penalising the assessee under section 271(1)(c) is upheld.

9. In the result, the appeal is dismissed.

(1995) 126 Taxation 140 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD BENCH 'B'

(Before Shri Abdul Razack and Shri B.L. Chhibber)

ITA Nos. 2952 to 2958/Ahd/1990

(Assessment Year 1986-87)

Assistant Commissioner of Income-tax, Junagadh

vs.

1. Smt. Nirmalaben Chunilal
2. Shri Chunnilal Gokaldas
3. Shri Rameshchandra, Punjabhai
4. Shri Kantilal Punjabhai
5. Shri Vrajlal Gokaldas
6. Smt. Hansaben Govindbhai
7. Smt. Maktagauri Popatlal, Manavadar

For the Appellant : **K.M. Chauhan**

For the Respondent : **K.C. Thaker**

Decided on : 21-12-1994

SHAM TRANSACTIONS — Assessees partners of two firms —

irms Commission Agents of a Chemical Mfg. Co. & also having leposits in Co. — Co. in financial difficulty — Assessees purchas-ng shares of Co. of Rs. 100 each with firm's deposits — Co. llegedly not during well and assessee's selling shares @ Re. 1 each after 3 days of purchase and claiming huge losses — Assessing Officer holding these transactions as sham & disallowing loss — CIT (A) allowing assessees' appeals — Held, Co. had huge accumulated losses and debts and investment of firms' funds in shares not wise — Partners known to Directors of Co. very well — Assessing Officer was justified in holding the transactions sham — CIT (A)'s order reversed.

ncome-tax Act, 1961 — Section 143(3).

FACTS

All the seven assessees were partners of either of the two firms viz. M/s Meghna Enterprise and M/s Amrut Trading Co. On 23-6-1985 the assessees purchased shares of M/s Meghdeep Chemicals Pvt. Ltd. @ Rs. 100/- per share and after a short time i.e. on 1-8-1985 sold the same @ Re. 1/- per share to five parties and claimed huge losses. These shares were purchased by the assessees with the amount of deposits of the firms with the Co. and these were sold as the Co. was in a bad financial shape. The CIT(A) allowed the assessee's claim and directed the allowance of short term capital loss. The Revenue filed second appeal.

DECISION

The Hon'ble Tribunal observed that the two firms came into existence on 12-4-1984 by executing identical partnership deeds. Business was also dentical i.e. working as Commission Agents in Chemicals. The Co. M/s Meghdeep Chemicals Co. (P.) Ltd. was also manufacturing chemicals and the two firms were Commission Agents. The two firms and partners were thus not strangers to the Co. and were very well aware of the financial protection of the Co. at the time of investment in shares. The Co. had accumulated loss of Rs. 23.24 lakhs as on 30-7-1984 and 59.28 lakhs as on 30-6-1985 with other heavy debts. The assessees were thus even not strangers to he affairs of the Co. Under such circumstances nobody would invest in shares of this type. The time interval between purchase and sale was also very short i.e. one month and seven days and also the transaction were private in nature as the shares were not quoted on stock exchange. Keeping all these factors no view and following Delhi High Court judgments 155 ITR 392 the Hon'ble Tribunal held that the sale of shares @ Re. 1/- per share as against the price of Rs. 100/- each paid only one month and one week ago was more a kin to a gift and that the Assessing Officer was justified in holding these transactions as sham and the assessees were not entitled to claim short term capital loss. The order of CIT(A) was thus reversed and that of the Assessing Officer restored.

Cases referred to :

1. *CIT vs. Durga Das More* 82 ITR 540 (SC)
2. *South Asia Industries (P) Ltd. vs. CIT* (1985) 155 ITR 392 (Del.)

Full text of the Order is given below :

ORDER

(B.L. Chibber)

The following two common grounds have been raised by the Revenue in these appeals :

(1) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that the claim of short term capital loss was not based on sham transactions.

(2) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that the claim of short term capital loss should have been allowed in the hands of the assessee.

2. The facts of these cases are somewhat extraordinary. All seven assessees are partners of either of the two firms viz. M/s Meghna Enterprise and M/s Amrut Trading Co. On 23-6-1985 the assessees purchased shares of M/s Meghdeep Chemicals Pvt. Ltd. at the rate of Rs. 100/- per share and after a short lapse of time on 1-8-1985 sold the same at the rate of Re. 1/- per share to :-

(1) Smt. Ranidevi Gautamchand Chowdhary

(2) Shri Gautamchand Sohanlal Chowdhary

(3) Shri Mahavirchand Sohanlal Chowdhary

(4) Shri Gautamchand Sohanlal Chowdhary

(5) Smt. Manjudevi Mahavirchand Chowdhary

In the process the assessee suffered huge losses.

3. The assessees claimed the losses as short term capital losses It was submitted before the Assessing Officer that the assessees were partners of the two firms referred to supra which firms had deposits with the company i.e. M/s Meghdeep Chemicals Pvt. Ltd. The company was not doing very well and was accumulating huge losses. The company's Chartered Accountants, who were negotiating with the Bankers for further credit facilities, informed the company that the Bank could consider the matter if the company took steps to broadbase its capital structures and reduced its interest burden. The bankers suggested that the depositors may be pursuaded to transfer the deposits to capital account so as to improve the debt-equity ratio. It was further submitted before the Assessing Officer that the company accordingly negotiated with the partners of the depositor firms who, otherwise having no hopes of return of the deposits, agreed to subscribe for shares

to be issued by the company. The company thereupon passed a resolution raising its paid up capital from Rs. 15 lakhs to Rs. 1 crore and allotted new shares to the concerned partners at par at the rate of Rs. 100/- per share. Subsequently, the assessees realised that the company was unlikely to get revived and accordingly they sold the shares at the rate of Re. 1 per share to the five persons referred to supra. The learned Assessing Officer was not satisfied with the arguments of the assessees and disallowed the losses as "dead" or "sham" losses on the following grounds :-

(a) That there was no commerical expediency to buy shares in exchange of deposit.

(b) No prudent businessman would buy shares for full consideration.

(c) That the decision in the case of South Asia Industries P. Ltd. 155 ITR 392 (Del.) was applicable.

4. The assessees challenged the action of the Assessing Officer before the CIT(A) and filed a "voluminous paper book" running into 107 pages The CIT(A) forwarded this paper book to the learned Assessing Officer for remand report. The Asstt. CIT submitted his remand report on 9-4-1990. The learned CIT(A) after reproducing the remand report in para 3 of his order held as under :

"In view of all these and the assessments of the company viz. Santosh Industrial Fate (P) Ltd., Ahmedabad, the main purchaser of the shares for the asst. year 1986-87, I am of the opinion that there is no sham transaction involved in the sale of shares under consideration and so the claim should have been allowed as a short term capital loss in the hands of the assessees."

5. The learned D.R. relied upon the orders of the Assessing Officer.

6. Shri K.C. Thaker, the learned counsel for the assessees supported the orders of the CIT(A). He submitted that the concerned partners who are respondents in these appeals subscribed to the new shares which were allotted to them by the company i.e. M/s Meghdeep Chemicals P. Ltd. The assessees have not purchased the shares held by other shareholders, but subscribed to the shares newly allotted to them. According to the learned counsel for the assessees, the assessees saw some gain in the bargain, as otherwise the entire deposit was taken as lost. Subsequently all the shareholders, old as well as the assessees respondents realised that the company was unlikely to get revived. Therefore it was thought appropriate to transfer the company to a willing buyer. Accordingly, agreement was made with one, Shri Gautam Sohanlal Chaudhary for sale of 88,000 shares of the face value of Rs. 100/- at the rate of Re. 1/- per share (pages 63 to 72 of the paperbook). According to the learned counsel for the assessee, the deal was justified considering the increasing and accumulated losses as on 30-6-1985 of Rs. 59.38 lacs and huge debts of over Rs. 82 lacs as against

the paid up capital of Rs. 88 lacs. The learned counsel for the assessees therefore submitted that the deal was with a party not in any way related or connected with the assessees. The learned counsel for the assessees further submitted as follows :

(a) The loss arose when shares—capital asset—purchased earlier were sold.

(b) The fact that there is loss—dead or otherwise is not in dispute.

(c) There is no dispute about the sale-price of the shares.

(d) The purchase price of the shares is actually the subscription of price of shares on allotment at par. The assessee had no option, having found it to be a desirable bargain, to negotiate on price.

(e) The finding that the loss is "sham" is based on the Assessing Officer's view that the action of the purchase of shares (not the subsequent sale thereof) was imprudent and was not dictated by commercial expediency. The Assessing Officer could not be taken to be the best judge of the situation. The issue needs to be seen from businessman's point of view. Besides, loss incurred could not be disallowed because one was imprudent or novice or incapable to do business.

(f) The Delhi High Court decision dealt with a case where all the concerned parties belonged to the same Dalmia-group, which is not the case here. The decision therefore would not apply to the instant case.

(g) It is not charged that the transaction is intended to transfer benefit to anybody. Only charge is that the action is imprudent and not dictated by commercial expediency. The Assessing Officer has not taken the correct view. The fact that the assessee could realise something would show that he was justified to entertain hope for still better outcome. If, this was no done, there was not chance of any recovery of the deposit."

7. We have considered the rival submissions and perused the facts on record. At the outset we must state that the CIT(A) has wrongly interpreted the remand report submitted by the Assessing Officer as favouring the assessees. It is noted that in the very beginning (para- 1 of the remand report) the Assessing Officer stated "At that time the assessee had not filed such a paper book". It is now filed. The question is whether the finding of "Sham loss" is still good inspite of new evidence". Thereafter the learned Assessing Officer has reproduced the factual position in the succeeding paragraphs and ultimately left the matter to the learned CIT(A) with the remarks "In view of the above facts of the case, suitable decision as deemed fit may kindly be taken after considering assessee's submission". After considering the contents of the remand report and the submissions, we hold that the

learned CIT(A) is not justified in giving the impugned relief on the basis of the remand report as he has mis-construed the contents of the remand report.

8. Coming to the facts of the case. It is noted that the firms viz. M/s Meghna Enterprise and M/s Amrut Trading Co. came into existence on 12-4-1984 by executing identical partnership deeds. The business to be carried on by the firms is also identical as is evident from para 4 of the two deeds of partnership which are reproduced as under :

> "Business : The business of the partnership is to trade and work as commission agents in all types of chemicals, auxiliaries, edible and non-edible oils. The partnership firm shall also carry on business as traders and agents in such chemicals, oils or such other commodities, as may be agreed upon from time to time. It shall be lawful for the partnership to undertake and carry on any other business or businesses as may be actually agreed upon. The partnership shall not engage itself in the business of speculation."

Thus, it is evident that the two firms and the company M/s Meghdeep Chemicals Co. P. Ltd. were dealing in chemicals - the company manufacturing chemicals and the two firms working as Commissions Agents in all types of chemicals. It is further noted from the balance sheet of the company as on 30-6-1985 (pages 35 and 36 of the paper book) that unsecured loans have been shown against "M/s Megha Enterprise (deposit from Selling Agent)" and "Amrut Trading Co. (deposit from Purchase Agent)". So the two firms of which the assessees were partners were not strangers to the company and as such the partners were very well aware of the financial position of the company at the time of investment in shares at the face value i.e. Rs. 100/- per share. It was also in the knowledge of the assessees that the company had accumulated loss of Rs. 23,24,223/- as on 30-6-1984 which accumulated to Rs. 59,27,798/- as on 30-6-1985. During the course of hearing we asked the learned counsel for the assessees whether the partners of the two firms were related to the Directors of the company, he could not give any clarification. We however find that all above noted seven assessees belonged to Patel Community and from the balance sheet of the company filed before us it is noted that all the Directors of the company also belong to Patel Community. Thus, the assessee before us were not strangers to the affairs of the company. Under such circumstances nobody would invest in shares of this type. The argument of the learned counsel for the assessees that the firms of which the assessees were partners had deposits with the company and having no hopes of the return of the deposits, agreed to subscribe for the shares, has no force. It is an admitted fact that the deposits belonged to the two firms and not to the partners to throw their good money after bad. The shares were bought for Rs. 100/- and sold for practically nothing resulting in huge losses. The time interval was

very short i.e. one month and 7 days and all the transactions were private in nature because the shares were not quoted on the stock exchange.

9. While disallowing the loss, the learned Assessing Officer relied upon the order of Delhi High Court in the case of *South Asia Industries (P) Ltd. vs. CIT* (1985) 155 ITR 392 (Del.). The CIT(A) has not expressed his opinion whether ratio laid down in the aforesaid case applies to the facts of the presents case. In our opinion, the ratio laid down by the Hon'ble High Court applies to the facts and circumstances of the present case. In the above noted case the assessee company belonging to Dalmia Group purchased the shares of a practically defuncts private company belonging to the same group at the rate of Rs. 3/- per share and sold them to another company belonging to the same group within a few months at the rate of 5 nP. per share thus incurring a heavy loss. The Hon'ble High Court held that the transaction was neither an investment nor a case of dealing in shares; it was more akin to a gift. The learned counsel for the assessee has distinguished the above judgments of the High Court from the assessee's case on the sole ground that the High Court decision dealt with a case where all the concerned parties belonged to the same Dalmia Group which is not the case here as the shares were sold to strangers. This thin line of distinction, in our opinion, makes hardly any difference because the assessees and the Directors of M/s Meghdeep Chemical Pvt. Ltd. were known to each other and the sale of shares at the rate of Re. 1/- per shares as against the price of Rs. 100/- per share paid only one month and one week ago, was more making to a gift. Thus the *ratio decidendi* of the judgment of the High Court applies to the facts of the present case.

10. After taking into consideration the totality of the facts and the surrounding circumstances, we hold that the learned Assessing Officer was justified in holding that the transactions were sham and the assessees were not entitled to claim short term capital loss. In this we are supported by the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Durga Prasad More* 82 ITR 540 wherein it has been held that the taxing authorities were entitled to look into the surrounding circumstances to find out the reality about the transactions. In this case what was produced before the Assessing Officer and the CIT(A) and before us was interested testimony of the assessees alone which can not be relied upon keeping in view the above noted background and the other surrounding circumstances of the case. We accordingly reverse the finding of the CIT(A) and restore those of the Assessing Officer.

11. In the result, the appeals are allowed.

(1995) 126 Taxation 147 (Trib.)

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CALCUTTA
(Before Shri N. Pachuau and Shri R.V. Easwar)
ITA No. 1555 (Cal.)/1990
(Assessment Year 1977-78)

Deputy Commissioner of Income-tax, Special Range-2, Calcutta
vs.
M/s. Tollygunj Club

For the Appellant	:	**O.P. Kar**
For the Respondent	:	**Kaushik Mukherjee**
Decided on	:	28-10-1994

CAPITAL GAINS — Compulsory acquisition of assessee's land — Additional compensation received in 1983 — Original assessment in which transfer effected in 1977-78 completed on 23-12-1980 — Asstt. for this year was set aside by the Tribunal regarding applicability of section 74A — While completing fresh assessment Assessing Officer included additional compensation also — CIT (A) deleting the said addition — Held, Asst. having been set aside for a limited purpose reg. applicability of sec. 74A, addl. compensation could not have been assessed — Revenue's contention for treating it as assessed u/s 155(7A) read with sec. 292B also rejected as proper procedure u/s 154 not followed — Section 54E(3) held procedural and the addl. compensation invested in units held to be in order — Revenue's appeal dismissed.

Income-tax Act, 1961 — Sections 54E, 74A, 154, 155(7A) & 292B.

FACTS

The original assessment for the assessment year 1977-78 was completed u/s 143(3) on 23-12-1980. The assessee filed appeal against this assessment. Vide order dated 10-2-1986 the Tribunal set aside the ITO's order with regard to the dispute of applicability of sec. 74A of the Act and the allowability of certain expenses under the said provisions. The assessment order was thus set aside only to consider this dispute. During the year 1983 the assessee also received "additional compensation of Rs. 42,79,012/- in respect of its land compulsarily acquired by the Govt. under the land Acquisition Act, 1976. This amount was also assessable in assessment year 1977-78. As this asstt. stood set aside till that then by the Tribunal, the Assessing Officer passed order u/s 143(3) read with sec. 254 on 18-5-1987 and assessed the additional compensation of Rs. 42,79,012/- also. In appeal in CIT(A) debited this addition holding that the Tribunal set aside the assessment only for examining the

applicability of sec. 74A and the Tribunal's order did not give authority to the Assessing Officer to bring to tax the Addl. compensation. Also that the addl. compensation was duly invested in the unit under the Capital Gains unit Scheme, 1983 in 1983 itself and was therefore, exempt from Capital Gains tax. The revenue filed a second appeal.

DECISION

The Hon'ble Tribunal held that the CIT(A) was right in holding that the Tribunal order setting aside the original assessment was only for a limited purpose to consider the dispute before it which only pertained to section 74A and the inclusion of the additional compensation in the fresh order dt. 18-5-1987 was wholly without authority. The Revenue's contention that the taxation of addl. compensation may be treated as assessed u/s 155 (7A) read with section 292 B was also rejected by the Tribunal. The Tribunal observed that before passing an order u/s 155 (7A) proper procedure as contemplated in sec. 154 has to be adopted. Since the power has not been exercised after following the procedure prescribed by section 154(3) and therefore cannot be upheld. Section 292B does not also come to the rescue of the revenue as it only cures or removes any defect or irregularity but it could not cure or set at right the very lack of jurisdiction to exercise the power u/s 155(7A). The Tribunal also held that sub-section (3) of section 54B had to be construed only as procedural and having retrospective application and as the additional compensation having been invested entirely in specified assets in accordance with sec. 54E(3) the Capital Gains, even of considered assessable are exempt from income-tax. The revenue's appeal was accordingly dismissed.

Cases referred to :

1. *Surrendra Overseas Ltd. vs. CIT* 120 ITR 872 Calcutta
2. *CIT vs. Sri. Jaganath Steel Corpn.* 191 ITR 676 Calcutta

Full text of the Order is given below :

ORDER

(R.V. Easwar, JM)

In this appeal by the revenue the only ground is as under :

> "That on the facts and in the circumstances of the case and having regard to the provisions of Section 155(7A) read with section 292B of the Income-tax Act, the Learned Commissioner of Income-tax (Appeals) erred in deleting the addition of Rs. 42,79,012/- by the Assessing Officer towards capital gains while passing order under Section 254 of the Income-tax Act."

2. In the original assessment completed u/s 143(3) on 23-12-1980 the additional compensation of Rs. 42,79,012/- received by the assessee in respect of the land compulsorily acquired by the Govt. under the Land Acquisition Act, 1976 was not brought to assessment under the head 'Capital

Gains' because the additional compensation itself was received only in the year 1983. It appears that there were appeals on certain other points which were ultimately decided by the Tribunal by order dated 24-3-1983. This order was recalled by the Tribunal on the assessee's application. Thereafter the Tribunal passed an order on 10-2-1986. It was a common order for the assessment years 1975-76 to 1977-78. In respect of the assessment year 1977-78 with which we are presently concerned, the dispute was with regard to the applicability of section 74A of the Act and the allowability of certain expenses under the said provision. After hearing the rival contentions, the Tribunal came to the following conclusion :

> "12. Having regard to the entire circumstances of the case, we are of the opinion that certain facts are to be brought out correctly on record, particularly when the ITO has not dealt with various points of contention raised by the assessee that section 74A was not applicable. The CIT(A) to some extent has dealt with this point, as far as the legal implication is concerned. But the factual aspect of the matter has not been dealt with properly. The ITO would also see the constitution or Articles of Association in order to ascertain what were the objects and purpose of the club and what were the activities which were authorised to be carried on by the assessee, particularly when the assessee has been contending all along that all the activities of the assessee constitute a business and some lease land was taken for carrying on such activities by the assessee. It is also necessary to ascertain whether the horse or some of them, if any, were held as stock-in-trade, vis-a-vis, the Balance Sheet for the year in which the horses have been shown in schedule 'A' of the fixed assets. Basic and relevant facts are necessary to be brought out on this point also. Accordingly we deem fit to set aside the orders of the authorities below in respect of this dispute before us and to restore the matter to the file of the ITO for fresh disposal after bringing all the relevant facts and basic materials on record and after giving the assessee adequate opportunity of being heard. The assessee is at liberty to place any material on record and after giving the assessee adequate opportunity of being heard. The assessee is at liberty to place any material evidence before the ITO before the case is disposed of afresh as indicated above. We, therefore, set aside the orders of the authorities below for the above purpose."

3. On 18-5-1987 the Assessing Officer passed an order u/s 143(3) read with section 254. In this order the amount of Rs. 42,79,012/- was brought to assessment with the narration "further compensation received during 1983". Against the assessment the assessee filed an appeal to the CIT(A). The CIT(A) held that the Assessing Officer was under the erroneous impression that the entire assessment was open and has proceeded to tax the additional compensation on that footing. According to the CIT(A) the Tribunal set aside the assessment only for the limited purpose of examining the applicability

of section 74A with reference to the facts and that order did not give authority to the Assessing Officer to bring to tax the additional compensation. He, therefore, held that the Assessing Officer cannot bring to tax the additonal compensation by the order dated 18-5-1987 passed u/s 254 read with section 143(3). He further noticed that the entire additional compensation was invested by the assessee in specified assets, i.e. units of Unit Trust of India (Capital Gains Unit Scheme, 1983) in 1983 itself and was, therefore, exempt from capital gains tax. In this view of the matter he deleted the addition of the additional compensation.

4. The revenue is in appeal against the order of the CIT(A). It is contended that the additional compensation is at any rate assessable u/s 155(7A) of the Act read with section 292B thereof. What the revenue says is that even if it is accepted that the Assessing Officer cannot include the additional compensation in the order dated 18-5-1987 which was passed to give effect to the Tribunal's order, the power to assess the additional compensation *must be held referable to section 155(7A) and should be upheld on that* basis. It is further stated that the inclusion of the amount of additional compensation in the order dated 18-5-1987 must be taken as a mere irregularity or a curable defect in view of section 292B. It is not possible to accept the contention. Firstly, the CIT(A) is right in his view that the amount of additional compensation cannot be brought to tax in the order passed to give effect to the Tribunal's order since the Tribunal's order gave the Income-tax Officer authority only to examine the applicability of section 74A with reference to certain facts. The Tribunal did not set at large the entire assessment with unlimited powers to the Assessing Officer. The order of the Tribunal cannot be so understood. It should be understood in the background of the dispute before it which only pertained to section 74A. The scope of the Tribunal's order cannot be enlarged merely by pointing out to the words used in the operative portion of its order divorced from the context in which the assessment was set aside. The principles laid down by the Calcutta High Court in the case of *Surrendra Overseas Ltd. vs. CIT* 120 ITR 872 do not authorise the action of the Assessing Officer and expose" the incorrect appreciation of the scope and tenor of the Tribunal's order. We, therefore, agree with the CIT(A) that the inclusion of the additional compensation in the order dated 18-5-1987 was wholly without authority.

5. We cannot also accept the claim of the revenue that to the extent of taxing the additional compensation the order dated 18-5-1987 should be treated as an order passed u/s 155(7A). This section does not dispense with the other requirements of section 154. It only gives power to the Assessing Officer to treat the omission to tax the additional compensation in the year of transfer as a mistake apparent from record. It also extends the period of limitation prescribed by section 154(7) for rectifying the assessment by enabling the Assessing Officer to reckon the time limit of

our years prescribed in section 154(7) from the end of the previous year n which the additional compensation was received. Section 155(7A) leaves he other provisions of section 154 untouched and unmodified. The requirement of giving noticing to the assessee and an opportunity of being heard with regard to the proposed rectification, when it involves an enhancement of assessment, prescribed by section 154(3) is not in any way abridged or taken way. That being so, the entire issue is one of jurisdiction. If the necessary urisdictional facts are not present the whole proceedings must be taken o be invalid. We have not been referred to any notice issued by the Assessing Officer before he brought the additional compensation to assessment in his order dated 18-5-1987. There is no discussion in this order regarding he facts relating to the assessment of the additional compensation except hat the same has been brought to assessment by a cryptic remark. Therefore, even assuming that the order dated 18-5-1987, insofar as it relates to the assessment of the additional compensation, is construed as an exercise of the power of the Assessing Officer u/s 155(7A) of the Act, the power has not been exercised after following the procedure prescribed by section 154(3) and, therefore, cannot be upheld. Section 292B does not come to he rescue of the revenue. It only cures or removes any defect or irregularity but it cannot cure or set at right the very lack of jurisdiction to exercise he power u/s 155(7A). It cannot be disputed that section 155(7A) derives ts sustenance only from section 154. It is, therefore, not possible to accept he revenue's contention that section 292B saves the exercise of the power o assess the additional compensation.

5. The whole issue, however, becomes academic if regard is bad to the act that the additional compensation has been invested in "specified assets" as prescribed by section 54E(3) of the Act. The CIT(A) has entered a categorical finding that the additional compensation has been entirely nvested in the specified assets, namely units of UTI (Capital Gains Unit Scheme, 1983). The receipt and investment of additional compensation, both were in the year 1983. These facts have not been challenged by the revenue. However, the contention of the revenue is that the exemption referable to the Second Proviso to Section 54E(1) and since the same came into the effect only by the Taxation Laws (Amendment) Act, 1984 with effect from 1-4-1984 the benefit thereof cannot be extended to the assessee for the assessment year 1977-78. We are unable to accept the contention. The Second Proviso only refers to a situation where the full amount of compensation awarded for the acquisition is not received by the assessee on the date of the transfer. It does not apply to a situation where he full amount of compensation claimed by the assessee was received at much later period. Such a situation is governed by sub-section (3) of section 54E. This sub-section was introduced by the Finance Act, 1978 with effect from 1-4-1978. The object of the sub-section is clear. Since it is common knowledge that where an assessee claims enhanced compensation for the

acquisition it takes a lot of time for him to receive the same but in th meantime the period prescribed by the Act for making investments of th compensation in the specified assets would have lapsed, the legislatu thought that it would be unfair to deprive or deny the benefit of exemptic to an assessee who for no fault of his own receives the additional con pensation after the period prescribed for making investment has lapse It was thought that due provision should be made to benefit such assesse also. Therefore, the legislature introduced sub-section (3). Under this su section the period of six months prescribed for making the investment wou be reckoned from the end of previous year in which the assessee receiv the additional compensation. This is a provision basically intended to bene the assessee. In Circular No. 240 dated 17-5-1978 issued by the CBD at paragraphs 17.6 to 17.9, the object of the provision has been explaine In the circular at para 17.9 it is stated that sub-section (3) would take effe from 1-4-1978. It was suggested on behalf of the revenue that this mear that the provision will be applicable only from 1978-79 assessment yea We are unable to accept the contention. The section obviously is a procedur section and not a substantive section. It is provision intended to mitiga the hardship caused by the delay in receipt of additional compensation an therefore, has to be treated only as a procedural provision taking retr spective effect. This means that it will apply for the assessment ye 1977-78 also since the additional compensation has been received aft 1-4-1978. It is to be remembered that the circular advisedly and significant does not stipulate that sub-section (3) will be applicable from the assessme year 1978-79, which is normally done in such circulars explaining the new introduced statutory provisions. It only states that the provisions will tak effect from 1-4-1978 which means that the benefit thereof is available all assessees who received additional compensation after that date. Ev as a matter of construction sub-section (3) of section 54E has to be constru only as procedural and having retrospective application having regard the object for which it is introduced and having regard to the terms the circular. In this connection we may refer to a similar provision whic was intended to remove the hardship caused to the assessees was construe by the Calcutta High Court in the case of *CIT vs. Sri Jagannath Ste Corporation* 191 ITR 676 as taking retrospective effect. The same princip is applicable to the present case also. We, therefore, hold that at any ra the additional compensation having been invested entirely in specified asse in accordance with section 54E(3) the capital gains, even if consider assessable, are exempt from income-tax.

7. For the aforesaid reasons we see no merit in the appeal by the revenu We, therefore, dismiss the same.

STATUTE

CIRCULARS / INCOME-TAX

Circular No. 698

Dated 26-12-1994

Sub : Finance (No. 2) Act, 1991 - Explanatory notes on the provisions relating to Direct Taxes (Circular No. 621) - Corrigendum to para 22.3 - regarding

In terms of Finance (No.2) Act of 1991, Section 43D of the Income-tax Act, 1961 came into force w.e.f. 1-4-1991. However, it was inadvertently mentioned in para 22.3 of Board's circular No. 621 dated 19-12-1991 that this provision would apply in relation to assessment year 1992-93 and subsequent years. It is clarified that Section 43D will take effect from 1-4-1991 and will apply in relation to assessment year 1991-92 and subsequent years.

2. This may be brought to the notice of all officers working in your region.

[F.No. 149/220/93-TPL]

Circular No. 699

Dated 30-1-1995

Sub : Requirement of deduction of income-tax at source section 194-I of the Income-tax Act — Payments of income by way of rent made to Government and entities whose income is exempt from income-tax under clauses (20) and (20A) of section 10 of the Income-tax Act - regarding

Queries have been raised as to whether the requirement of deduction of income-tax at source under section 194-I of the Income-tax Act applies in case of payment by way of rent to the Government, statutory authorities referred to in section 10(20A) and local authorities whose income under the head 'Income from house property' or 'Income from other sources', is exempt from income-tax.

2. Under the provisions of section 196 of the Income-tax Act, no tax is required to be deducted at source from any sums payable to the Government.

3. The matter with regard to the statutory authorities and the local authorities referred to above, has been examined in the Board. Section 190 of the Income-tax Act provides for deduction of income-tax at source as one of the modes of collection of income-tax in respect of an income, notwithstanding that the regular assessment in respect of such income is to be made in a later assessment year. The income of an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation for the purpose of planning, development or improvement of cities, towns and

villages, is exempt from income-tax under section 10(20A). Similarly, the income of a local authority which is chargeable under the head 'Income from house property' or 'Income from other sources' is exempt from income-tax under section 10(20). There is no other condition specified in these two clauses of section 10 which is necessary to be satisfied in order to avail of the income-tax exemption.

4. In view of the aforesaid, there is no requirement to deduct income-tax at source on income by way of 'rent' if the payee is the Government. In the case of the local authorities and the statutory authorities referred to in para 3 of this circular, there will be no requirement to deduct income-tax at source from income by way of rent if the person responsible for paying it is satisfied about their tax-exempt status under clauses (20) or (20A) of section 10 on the basis of a certificate to this effect given by the said authorities.

[F.No. 133/170/94-TPL]

Circular No. 700

Dated 23-3-1995.

Sub : Deduction under section 80-O of the Income-tax Act, 1961 — Classification regarding

Section 80-O of the Income-tax Act, 1961, provides for a deduction of 50% from the income of an Indian resident by way of royalty, commission, fees or any similar payment from a foreign Government or enterprise :

(a) in consideration for the use outside India of any patent, invention, model, design, secret formula or process etc.; or

(b) in consideration of technical or professional services rendered or agreed to be rendered outside India to such foreign Government or enterprise.

In either case, the requirement is that the income should be in convertible foreign exchange.

2. It has been clarified in the Explanation (iii) to section 80-O that service rendered or agreed to be rendered outside India [i.e. item (b) above] shall include services rendered from India but shall not include services rendered in India.

3. A question has been raised as to whether the benefit of section 80-O would be available if the technical and professional law services, though rendered outside India, are used by the foreign Government or enterprise in India.

4. The matter has been considered by the Board. It is clarified that as long as the technical and professional services are rendered from India and are received by a foreign Government or enterprise outside India, deduction under section 80-O would be available to the person rendering the services even if the foreign recipient of the services utilises the benefit of such services in India.

5. The contents of this circular may be given wide publicity and brought to the

notice of all the subordinate authorities under your charge for information and necessary action.

[F.No. 473/7/94-FTD]

Circular No. 701

Dated 23-3-1995

Sub : Taxability of allowances received by persons having income under the head 'Salaries'

As per sub-clauses (iiia) and (iiib) of section 2(24 read with section 17 of the Income-tax Act, 1961, any allowance, by whatever name called, given by the employer to the employee, is taxable as income in the hands of the employee. All allowances including Dearness Allowance, Additional Dearness Allowance, City Compensatory Allowance, House Rent Allowance, Meal Allowance, Servant Allowance, Telephone Allowance, Education Allowance, Refreshment Allowance, Dinner Allowance, Health Allowance, Holiday Allowance, Special Qualification Allowance, etc., are 'income' in the hands of the employee, unless specifically exempted under the Income-tax Act, 1961 or any other statute.

2. The major exemption in respect of allowances given by the Income-tax Act, 1961, are as under :

(i) *House Rent Allowance*

Under section 10(13A) of the Income-tax Act, any special allowance specifically granted to an assessee by his employer to meet expenditure incurred on payment of rent (by whatever name called) in respect of residential accommodation occupied by the assessee is exempt from income-tax to the extent, as may be prescribed, having regard to the area or place in which such accommodation is situated and other relevant considerations. According to rule 2A of the Income-tax Rules, 1962, the quantum of exemption allowable in respect of special allowance to meet expenditure on payment of rent will be :

(a) the actual amount of such allowance received by an employee in respect of the relevant period; or

(b) the actual expenditure incurred in payment of rent in excess of one-tenth of the salary due for the relevant period; or

(c) where such accommodation is situated in Bombay, Calcutta, Delhi or Madras, 50% of the salary (40% of the salary where the accommodation is situated at other places) due to the employee for the relevant period;

whichever is the least.

For this purpose, 'salary' includes dearness allowance if the terms of employment so provide, but excludes all other allowances and perquisites.

(ii) *Allowances notified for exemption by the Central Government under section 10(14) of the Income-tax Act, 1961*

Clause (14) of section 10 provides for exemption for the following allowances :

(a) any special allowance or benefit granted to an employee to meet the expenses incurred in the performance of his duties, which the Central Government may specify by notification in the Official Gazette to the extent to which such expenses are actually incurred for that purpose ;

(b) any allowance granted to an assessee either to meet his personal expenses at the place of his posting or at the place he ordinarily resides or to compensate him for the increased cost of living, which the Central Government may specify by notification in the Official Gazette.

However, the allowance, referred to in (b) above, should not be in the nature of a personal allowance granted to the assessee to remunerate or compensate him for performing duties of a special nature relating to his office or employment, unless such allowance is related to his place of posting or residence.

By Notification Nos. S.O. 143(E) dated 21-2-1989, S.O. 144(E) dated 21-2-1989 (as amended by Notification Nos. S.O. 259 (E) dated 27-3-1990, S.O. 487 (E) dated 1-7-1992 and S.O. 59 (E) dated 27-1-1995), S.O. 606 (E) dated 9-6-1989 and S.O. 267 (E) dated 29-3-1990, the Central Government have specified the following allowance as exempt to the extent and subject to the conditions indicated therein :

(a) any allowance granted to meet cost of travel on tour or on transfer, including any allowance granted to meet the ordinary daily charges incurred by an employee on account of absence from his normal place of duty ;

(b) any special compensatory allowance in the nature of border area allowance or remote area allowance or difficult area allowance or disturbed area allowance;

(c) tribal area allowance;

(d) any special compensatory allowance in the nature of Composite Hill Compensatory Allowance or High Altitude Allowance or Uncongenial allowance, Climate allowance or Snowbound Area Allowance or Avalanche Allowance;

(e) compensatory field are a allowance;

(f) compensatory modified field area allowance;

(g) any special allowance in the nature of insurgency allowance granted to the members of armed forces operating in areas away from their permanent location for a period of more than 30 days;

(h) any allowance granted to meet the expenditure incurred on conveyance in the performance of duties of an office or employment of profit;

(i) any allowance granted to meet the expenditure incurred on a helper where such a helper is engaged for the performance of duties of an office or employment of profit;

(j) any allowance granted for encouraging academic research and any other professional pursuit;

(k) any allowance granted to meet the expenses incurred on the purchase or maintenance of uniform for wear during the performance of the duties of an office or employment of profit;

(l) Children Education Allowance;

(m) any allowance granted to any employee to meet the hostel expenditure of his child;

(n) allowance granted to an employee working in a transport system to meet his personal expenses during his duty performed in the course of running of such transport from one place to another.

In the notifications issued under s. 10(14) of the Act, only the nature of the allowances which are exempt from tax have been mentioned. The nomenclature may vary from institution to institution. It is further clarified that even though the words 'in the nature of' have not been used in the notifications exempting tribal area allowance, children education allowance, Compensatory Field Area Allowance and Compensatory Modified Field Area Allowance, allowances which are in the nature of the aforesaid allowances will be exempt under s. 10(14)(ii) of the Act to the extent and subject to the conditions specified in the notification.

(iii) *Entertainment Allowance*

A deduction is also allowed under clause (ii) of section 16 in respect of any allowance in the nature of an entertainment allowance specifically granted to the assessee by his employer subject to the certain limits. In the case of a Government employee, a sum equal to one-fifth of his salary (exclusive of any allowance, benefit or other perquisite) or five thousand rupees or the actual amount of entertainment allowance, whichever is the least, is allowable as deduction. In the case of a non-Government employee, deduction for entertainment allowance to the extent specified in sub-clause (b) of clause (ii) of section 16 will be given only if the allowance is regularly received by him from his present employer from a date prior to 1st April, 1955.

(iv) *Allowance paid or allowed outside India by the Government*

Section 10(7) provides for exemption of any allowance or perquisite paid or allowed as such outside India by the Government to a citizen of India India for rendering service outside India.

3. It is clarified that consequent to the amendment of section 10(14) by the Director Tax Laws (Amendment) Act, 1987 (w.e.f. 1st April, 1989), all circulars, instructions and clarifications issued by the Board regarding section 10(14) upto 31st March, 1989 ceased to have effect from assessment year 1989-90 and onwards.

4. The contents of the Circular may be brought to the notice of all officers working in your region.

[F.No. 200/71/94-ITA-I]

NOTIFICATION / INCOME-TAX

Notification No. 9710 — *Dated 21-2-1995*

In exercise of the powers conferred by clause (a) of the explanation to section 115AD of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby specifies the Foreign Institutional Investors specified in the table below for the purposes of the said section.

List of Foreign Institutional Investors registered with SEBI acting as sub-accounts of other registered FIIs

Name of the Sub Accounts registered as FIIs	*Global Custodian*
1. Asia Dynasty Fund	Bankers Trust Company, P.O. Box 3343, Church Street Station, New York-10008.
2. Acorn Fund	State Street Bank and Trust Company, 225 Franklin Street, Boston, MA.
3. Acorn International	State Street Bank and Trust Company, 225 Franklin Street, Boston, MA
4. Allied Dunbar International Specialist Funds Plc	Royal Bank of Scotland Plc, Securities Services, P.O. Box 1727, 1 Redheughs Avenue, Edinburgh EH 129JN
5. Anglo and Overseas Trust Plc	Morgan Grenfell Trust Managers Ltd, 20 Finsbury Circus, London EX2M 1NB, England.
6. Asian Newly Industrialised Countries Fund	Hongkong Bank Trustees Ltd., Level 13, 1 Queens Road Central, Hongkong.
7. Antenna Fund Ltd.	Bank of Bermuda, Bank of Bermuda Building, 5 Front Street, Hamilton, Bermuda.
8. Alaska Permanent Fund	Brown Brothers Harriman & Co., 40 Water Street, Boston, Massachusetts 02109, USA
9. Asia Selection Portfolio	Fledgeling Nominees Intern- ational Ltd., P.O. Box 309 Grand Cayman, Cayman Islands, British West Indies.
10. Amas Mauritius Ltd.	Amas UK Ltd., 16 Charles II Street, London SWIY 4QU, United Kingdom.

11.	Barclays Hongkong Retirement Scheme	Barclays Global Securities Services, Murray House, 1 Royal Mint Court, London EC3N 4HH, UK
12.	BZW Hongkong Staff Retirement Scheme	Barclays Global Securities Services, Murray House 1 Royal Mint Court , London EC3N 4HH, UK
13.	Baring International Investment Ltd. for Employee Benefits	Bankers Trust Company, P.O. Box 3343, Plan Fund Church Street Station, New York 10008
14.	Buchanan Fund Pacific Sub Fund	Buchanan Partners Limited, Buchanan House, 3 St. James' Square, London SWIY 4 JW, United Kingdom
15.	Buchanan Fund Emerging Markets Sub Fund	Buchanan Partners Limited, Buchanan House, 3 St James' Square, London SWIY 4 JW, United Kingdom
16.	BT Life Statutory Fund No. 3	Citibank NA, 42/F, Citibank Tower, Citibank Plaza, 3 Garden Road, Central, Hongkong
17.	BT Life Statutory Fund No. 4	Citibank NA, 42/F, Citibank Tower, Citibank Plaza, 3 Garden Road, Central, HongKong
18.	Columbia University in the City of New York	Morgan Stanley Trust Company 1 Pierrepont Plaza, Brooklyn, New York-11201
19.	Commander Fund	Morgan Stanley Bank Luxembourg SA, 74 Grand Rue, L 1660 Luxembourg
20.	Citicorp Vickers Asia Pacific Ltd.	Citicorp Investment Bank (Singapore) Ltd., No. 5 Shenton Way, #29-01 UIC Bldg, Singapore 0106, Republic of Singapore
21.	Dossier de' Gestion Collective, SICAV	Fledgling Nominees International Ltd., P.O. Box 309, Grand Cayman, Cayman Islands, British West Indies

22.	Emerging Markets Trust	Chase Manhattan Bank Luxembourg SA, P.O. Box 240, L 2012, Luxembourg
23.	Explorer Mauritius	Morgan Stanley Bank Luxembourg SA, 74 Grant Rue, L 1660 Luxembourg
24.	EFM Dragon Trust Plc	Royal Bank of Scotland Plc, Securities Services, P.O. Box 1727, 1 Redheughs Avenue, Edinburg EH 129 JN
25.	Foreign & Colonial India Ltd.	Banque General du Luxembourg, 14 Rue Aldringen, L2951, Luxembourg
26.	Fleming Emerging Markets Investment Trust	Robert Fleming Nominee Ltd., 25 Captahll Avenue, London EC2R 7DR
27.	Fleming Merchantile Investment Trust	Robert Fleming Nominees Ltd., 25 Capthall Avenue, London EC2R 7DR
28.	GTE Service Corporation Pension Plan	Bankers Trust Company, P.O. Box 3343, Church Street Station, New York 10008
29.	Govett Oriental Investment Trust Plc	Chase Manhattan Bank Ireland and Plc, P.O. Box 261, 1 Chase side, Bournemouth, Dorset BH7 7DB, UK
30.	Govett Emerging Markets Investment Trust Plc	Chase Manhattan Bank Ireland Plc, IP.O. Box 261, 1 Chase side, Bournemouth, Dorset BH7 7DB, UK
31.	Govett India Fund (Mauritius) Ltd.	Chase Manhattan Bank Ireland Plc, P.O. Box 261, 1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
32.	G.T. Global Emerging Markets Fund	State Street Bank and Trust Company; 225 Franklin Street, Boston, MA
33.	GT 4073	State Street Bank and Trust Company, 225 Franklin Street, Boston, MA
34.	GT Global Telecommunication Fund	Hongkong and Shanghai Banking Corporation Ltd., Bombay

35.	GT Newly Industrialised Countries Fund	Bank of Bermuda, Bank of Bermuda Building, 6 Front Street, Hamilton, Bermuda
36.	GAM Pacific Inc	Bank of Bermuda, Bank of Bermuda Building, 6 Front Street, Hamilton, Bermuda
37.	GAM Asean Inc	Bank of Bermuda, Bank of Bermuda Building, 6 Front Street, Hamilton, Bermuda
38.	Hongkong Baptist College Superannuation Fund	Barclays Global Securities Services, Murray House, 1 Royal Mint Court, London EC3N 4HH, UK
39.	Hill Samuel Capital Trust	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P, 2LX, England
40	Heritage Income Growth Trust	Chemical Ireland Custody and Trustee Services Ltd., Ormonde House, Earlsfort Centre, 12 Lower Leason Street, Dublin 2
41.	Heritage Capital Appreciation Trust	Chemical Ireland Custody and Trustee Services Ltd., Ormonde House, Earlsfort Centre, 12 Lower Leason Street, Dublin 2
42.	Hill Samuel Far East Trust	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P 2LX, England
43.	Hill Samuel International Trust	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P 2LX, England
44.	International Equity Fund	Chase Manhattan Bank Ireland Plc, P.O. Box 261, 1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
45.	IBR 20	State Street Bank and Trust Company, 225 Franklin Street, Boston, MA
46.	India Liberalisation Fund (Mauritius) Ltd.	Brown Brothers Harriman (Luxembourg) SA, 33 Boulevard Prince Henri BP 403, L 2014, Luxembourg

47.	Ibex Holdings Ltd.	Fledgeling Nominee International Ltd., P.O. Box 309, Grand cayman, Cayman Islands, British West Indies
48.	Indusind Mutual Fund Ltd.	Amas UK Ltd., 16 Charles II Street, London SWIY 4 QU, United Kingdom
49.	Janola Asian Markets Management Unit Trust	State Street Bank and Trust Company, 225 Franklin Street, Boston, MA
50.	Jardine Fleming India Trust	FledgelingNominees International Ltd., P.O. Box 309, Grand Cayman, Cayman Island, British West Indies
51.	Jardine Fleming Mauritius Investment Limited	Fledgling Nominees International Ltd., P.O. Box 309, Grand Cayman, Cayman Islands, British West Indies
52.	Klienwort Emerging Markets Trust Plc.	Citibank NA, 3rd Floor, Cottons Centre, Hays lane, London SEL 2BT, U.K.
53.	LG Asian Smaller Companies Fund Ltd.	Bank of Bermuda, Bank of Bermuda Building, 6 Front Street, Hamilton, Bermuda
54.	LG India Fund Ltd	HSBC Trustee (Mauritius) Ltd., Port Louis Offshore Banking Unit, P.O. Box 1038, Port Louis, Mauritius
55.	Morgan Stanley Institutional Fund, Inc - Asia Equity Portfolio	Morgan Stanley Trust Company, 1 Pierrepont Plaza, Brooklyn, New York 11201
56.	Morgan Stanley Fund, Inc - Asian Growth Fund	Morgan Stanley Trust Company, 1 Pierrepont Plaza, Brooklyn, New York 11201
57.	Morgan Stanley Emerging Markets Portfolio	Morgan Stanley Bank Luxembourg SA, 74 Grand Rule, L 1660 Luxembourg
58.	Morgan Stanley Emerging Markets Fund Inc	Morgan Stanley Trust Company, 1 Pierrepont Plaza, Brooklyn, New York 11201
59.	Morgan Stanley Institutional Fund, Inc — Emerging Markets Portfolio	Morgan Stanley Trust Company, 1 Pierrepont Plaza, Brooklyn, New York 11201

60.	Morgan Stanley Asset Management -Emerging Markets Trust	State Street Bank and Trust Company, 225 Franklin Street, Boston, MA
61.	MLC Life Ltd. Fund	Chase Manhattan Bank Ireland Plc, P.O. Box 261, 1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
62.	Murray Smaller Markets Trust Plc	Morgan Guaranty Trust Company of New York, #26-03 DBS Building, 6 Shenton Way, Singapore 0106
63.	Murray International Trust Plc	Morgan Guaranty Trust Company of New York, #26-03 DBS Building, 6 Shenton Way, Singapore 0106
64.	Martin Curie Unit Trust Ltd - Par East Growth Fund	Bank of Scotland, Broad Street House, 55 Old Broad Street, London EC2P, 2HL
65.	MLC Life Limited	State Street Bank & Trust Co.
66.	Morgan Grenfell Funds Plc - Asian Investment Fund	Morgan Grenfell nvestment IManagement (Asia) Pvt. Ltd., 20 Raffles Place, Ocean Towers #25-08, Singapore 0104
67.	Monetary Authority of Singapore	Government of Singapore Investment Corporation, 250 North Bridge Road, #33-00, Raffles City Tower, Singapore 0617
68.	Newton South East Asia Exempt Income Fund	Bank of Scotland, Broad Street House, 55 Old Broad Street, London, EC2P 2HL
69.	Newton Income Fund	Bank of Scotland; Broad Street House, 55 Old Broad Street, London, EC2P 2HL
70.	Newton Growth Fund	Bank of Scotland, Broad Street House, 55 Old Broad Street, London, EX2P 2HL
71.	Newton General Fund	Bank of Scotland, Broad Street House, 55 Old Broad Street, London EC2P 2HL
72.	Newton Global Fund	Bank of Scotland, Broad Street House, 55 Old Broad Street, London EC2P 2HL

73.	Newton International Bond Fund	Bank of Scotland, Broad Street House, 55 Old Broad Street, London EC2P 2HL
74.	Newton Exempt Fund	Bank of Scotland, Broad Street House, 55 Old Broad Street, London EC2P 2HL
75.	National Provident Fund	State Street Bank and Trust Company, 225 Franklin Street, Boston, MA
76.	Overseas Investment Trust Plc	Morgan Grenfell Trust Managers Ltd., 20 Finsbury Circus, London EC2M 1NB, England
77.	Risinghill Investment Corporation Limited	Fledgeling Nominees International Ltd., P.O. Box 309, Grand Cayman, Cayman Islands, British West Indies
78.	SECV Superannuation Pty Ltd. as Trustee of SEC Trust Company, Superannuation Fund	State Street Bank and 225 Franklin Street, Boston, MA
79.	Schroder Pacific Emerging Markets Fund	Chase Manhattan Bank Ireland Plc, P.O. Box 261, 1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
80.	Schroder International ESA Fund	Chase Manhattan Bank Ireland Plc, P.O. Box 261, 1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
81.	Schroder International Equity Fund	Chase Manhattan Bank Ireland Plc, P.O. Box 261,1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
82.	Stichting Emerging Markets GAK Pension fondsen III	Chase Manhattan Bank Ireland Plc, P.O. Box 261, 1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
83.	Schroder Emerging Markets Fund	Chase Manhattan Bank Ireland Plc, P.O. Box 261,1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
84.	Sharina CV	Chase Manhattan Bank Ireland Plc, P. O. Box 261, 1 Chase Side, Bournemouth, Dorset BH7 7DB, UK
85.	Shell Australia Pension Fund	State Street Bank and Trust Company, 225 Franklin Street, Boston, MA

86.	The Bombay Fund Ltd.	Hongkong Bank, 52/60, 1 M G Road, Bombay 40000
87.	TSB Pacific Unit Trust	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P, 2LX, England
88.	TSB International Unit Trust	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P, 2LX, England
89.	TSB Group Pension Scheme	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P, 2LX, England
90.	TSB Managed Pension Fund	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P, 2LX, England
91.	Target Managed Pension Fund	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P, 2LX, England
92.	Target Managed Life Fund	Hill Samuel Investment Management Ltd., 45 Beech Street, London EC2P, 2LX, England
93.	The Baring Chrysalis Fund Ltd.	Baring Brothers (Guernsey) Ltd., P.O. Box 71, Arnold House, St Julian's Avenue, Channel Islands, Guernsey GY13DA
94.	The Baring Emerging Markets Markets Fund	Baring Brothers (Buernsey) Ltd., P.O. Box 71, Arnold House, St Julian's Avenue, Channel Island, Quernsey GY13DA
95.	The British Investment Trust Plc	Royal Bank of Scotland Plc, Securities Services P.O. Box 1727, 1 Redheughs Avenue, Edinburgh EH 129JN
96.	The Emerging Markets GAK Pension- fondsen II	Chase Manhatten Bank Ireland Plc, P.O. Box 261, 1 Chase Side, Bournemouth, Dorset BH7, 7DB, UK
97.	The India Fund Inc	Bank of New York, One Wall Street, New York, New York 10286
98.	Tiger	Morgan Stanley Bank Luxembourg SA, 74 Grand Rue, L 1660 Luxembourg

99.	United Parcle Service of America	Bankers Trust Company, P.O. Box 3343, Inc Pension Plan Church Street Station, New York 10008
100.	World Frontier Fund	Nomura Bank, 6 Avenue, Emile, Reuter L2420, Luxembourg
101.	Wardley Global Selection Asian Equity Fund	Hongkong Bank Trustees Ltd., Level 13, 1 Queens Road Central, Hongkong
102.	Warburg Pincus International Equity Fund	Warburg Pincus Counsellors Inc, 466 Lexington Avenue, New York, New York 10017, USA
103.	Warburg Pincus Institutional Fund, Inc	Warburg Pincus Counsellors Inc, 466 Lexington Avenue, New York, New York 10017, USA

Notification No. 9715 — *Dated 9-3-1995*

Whereas by notification number S.O.878(E) dated the 30th November, 1992 issued under clause (b) of *Explanation* to section 35AC of the Income-tax Act, 1961 (43 of 1961), the Central Government had specified at serial number 8 the Hospital Centre Project at Trivandrum of Ramkrishna Math, Belur Math, District Howrah, West Bengal-711202 as an eligible project or scheme for a period of three assessment years commencing from the assessment year 1993-94 ;

And whereas the said project or scheme is likely to extend beyond three years;

And whereas the National Committee has, being satisfied that the said project or scheme is being executed properly, made a further recommendation under sub-rule (5) of rule 11M of the Income-tax Rules, 1962 for specifying the said project or scheme for a further period of three years;

Now, therefore, the Central Government in exercise of the powers conferred by clause (b) of *Explanation* to section 35AC of the Income-tax Act, 1961 hereby specifies the hospital project at Trivandrum of the Ramkrishna Math, Belur Math, District Howrah, West Bengal-711202 at the estimated cost of rupees fifty six lakhs as an eligible project or scheme for a further period of three assessment years commencing from the assessment year 1996-97.

[F.No. NC-155/94]

Notification No. 9716 — *Dated 9-3-1995*

Whereas by notification number S.O. 267 (E) dated the 29th March, 1994 issued under clause (b) of *Explanation* to section 35AC of the Income-tax Act, 1961

(43 of 1961), the Central Government had specified at serial number 14 the construction of fully equipped hospital named as Ramco Appollo Diagnostic Centre at Rajapalayam Kamaraj District Tamilnadu of P.A.C. Ramasamy Raja Centenary Trust, "Rama Mandiram" Tenkasi Road, Rajapalayam, Kamaraj District Tamilnadu as an eligible project or scheme for a period of two assessment years commencing from the assessment year 1993-94 ;

And whereas the said project of scheme is likely to extend beyond two years.

And whereas the National Committee has, being satisfied that the said project or scheme is being executed properly, made a further recommendation under sub-rule (5) or rule 11M of the Income-tax Rules, 1962 for specifying the said project or scheme for a further period of two years ;

Now, therefore, the Central Government in exercise of the powers conferred by clause (b) of *Explanation* to section 35AC of Income-tax Act, 1961 hereby specifies the construction of fully equipped hospital named as Ramco Appollo Diagnostic Centre at Rajapalayam Kamaraj District Tamilnadu of P.A.C. Ramasamy Raja Centenary Trust, "Rama Mandiram" Tenkasi Road, Rajapalayam, Kamaraj District Tamilnadu at the estimated cost of Rs. 386 lakh as an eligible project or scheme for a further period of two assessment years commencing from the assessment year 1996-97 on the following conditions, namely :-

(a) (i) 40 per cent of common clinical tests are provided free and 25 per cent at concessional rate ;

(ii) 25 per cent X-Rays & E.C.G. tests are provided free and 25 per cent at concessional rates; and

(iii) 25 per cent other routine tests free and 25 per cent at concessional rate;

(b) (i) free treatment is given to those patients whose family income does not exceed Rs. 10,000; and

(ii) 25 per cent to in 35 per cent concession is given to patients with annual family income between Rs. 10,000 to Rs. 15,000.

[F.No. NC-155/94]

Notification No. 9717 — *Dated 9-3-1995*

Whereas by notification number S.O. 711(E) dated the 25th September, 1992 issued under clause (b) of *Explanation* to section 35AC of the Income-tax Act, 1961 (43 of 1961), the Central Government had specified at serial number 6 the (i) Construction of dwelling units for the rural poor; and (ii) Mobile Medical services and Health Education of Ramakrishna Mission Belur Math, District Howrah, West Bengal-711202 as eligible projects or schemes for a period of three assessment years commencing from the assessment year 1993-94;

And whereas the said project or scheme is likely to extend beyond three years;

And whereas the National Committee has, being satisfied that the said project or scheme is being executed properly, made a further recommendation, under sub-rule (5) of rule 11M of the Income-tax Rules, 1962 for specifying the said projects or schemes for a further period of three years;

Now, therefore, the Central Government in exercise of the powers conferred by clause (b) of *Explanation* to section 35AC of the Income-tax Act, 1961 hereby specifies the (i) Construction of dwelling Units for the rural poor at Hooghly at the estimated cost of Rs. 50 lakh and (ii) providing mobile Medical Services and Health Education at Bankura District at the estimated cost of Rs. 15 lakh by the Ramakrishna Mission Belur Math, District Howrab, West Bengal-711202 as eligible projects or schemes for a further period of three assessment years commencing from the assessment year 1996-97.

[F.No. NC-155/94]

STATUTE

NOTIFICATION / INCOME-TAX

Notification No. 9747 — *Dated 5-4-1995* — Notification u/s 90 of the IT Act, 1961—Double Taxation Avoidance Agreement between Govt. of the Republic of India and the Govt. of the People's Republic of China.

Whereas the annexed Agreement between the Government of the Republic of India and the Government of the People's Republic of China for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income has come into force on the 21st day of November, 1994 after the notification by both the Contracting States to each other of the completion of the procedures required under their laws for bringing into force of the said Agreement in accordance with Article 28 of the said Agreement;

Now, therefore, in exericse of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said Agreement shall be given effect to in the Union of India.

ANNEXURE

AGREEMENT BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF INDIA

AND

THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

FOR THE

AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

The Government of the Republic of India and the Government of the People's Republic of China,

Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,

Have agreed as follows :

ARTICLE 1

Personal Scope

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2

Taxes Covered

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property, as well as taxes on capital appreciation.

3. The existing taxes to which the Agreement shall apply are :

(a) in China :

(i) the individual income-tax;

(ii) the income-tax for enterprises with foreign investment and foreign enterprises;

(iii) the local income-tax;

(hereinafter referred to as "China Tax").

(b) in India :

the income-tax including any surcharge thereon;

(hereinafter referred to as "Indian tax").

4. This Agreement shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes referred to in paragraph 3. The competent authorities of the Contracting States shall notify each other of any substantial changes which have been made in their respective taxation laws within a reasonable period of time after such changes.

ARTICLE 3

General Definitions

1. For the purposes of this Agreement, unless the context otherwise requires:

(a) the term "China" means the People's Republic of China; when used in geographical sense, means all the territory of the People's Republic of China, including its territorial sea, in which the Chinese laws relating to taxation apply, and any area beyond its territorial sea, within which the People's Republic of China has sovereign rights of exploration for an exploitation of resources of the sea-bed and its sub-soil and superjacent water resources in accordance with international law;

(b) the term "India" means the territory of the Republic of India and includes the territorial sea and airspace above it, as well as any other maritime one in which India has sovereign rights, other rights and

jurisdictions, according to the Indian law and in accordance with international law;

(c) the term "a Contracting State" and "the other Contracting State" means China or India as the context requires;

(d) the term "tax" means Chinese tax or Indian tax, as the context requires;

(e) the term "person" includes an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States;

(f) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;

(g) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean, respectively, an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

(h) the term "nationals" means any individual possessing the nationality of a Contracting State and any legal person, partnership or association deriving its status from the laws in force in the Contracting State;

(i) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise which is resident of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;

(j) the term "competent authority" means, in the case of China, the State Administration of Taxation or its authorised representative, and in the case of India, the Central Government in the Ministry of Finance (Department of Revenue) or their authorised representative.

2. As regards the application of this Agreement by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State concerning the taxes to which this Agreement applies.

ARTICLE 4

Resident

1. For the purposes of this agreement, the term "resident of a Contracting State" means any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of head office or any other criterion of a similar nature.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows :

(a) He shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);

(b) If the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be resident of the State in which he has an habitual abode;

(c) If he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;

(d) If he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its head office is situated.

ARTICLE 5

Permanent Establishment

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially :

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) a warehouse, in relation to a person providing storage facilities for others;

(h) a farm, plantation or other place where agriculture, forestry, plantation or related activities are carried on;

(i) an installation or structure used for exploration or exploitation of natural resources, but only if so used for a period of more than 185 days;

(j) a building site or construction, installation or assembly project or

supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 188 days;

(k) the furnishing of services other than technical services as defined in Article 12 (Royalties and Fees for Technical Services), by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, but only if activities of that nature continue within that other Contracting State for a period or periods aggregating more than 183 days.

3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include :

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.

4. Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of an independent status to whom the provisions of paragraph 5 apply is acting in a Contracting State n behalf of an enterprise of the other Contracting State, has and habitually exercises an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to these mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost

wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

ARTICLE 6

Income from Immovable Property

1. Income derived by a resident of a Contracting State from immovable property situated in the other Contracting State may be taxed in that other Contracting State.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

ARTICLE 7

Business Profits

1. The profit of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of them as is directly or indirectly attributable to that permanent establishment.

The provisions of this paragraph shall, however, not apply if the enterprise proves that the above activities could not have been undertaken by the permanent establishment or have no relation with the permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting

State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independetly with the enterprise of which it is a permanent establishment.

3. Insofar as the tax law of a Contracting State provides with respect to a specific business activity that the profits to be attributed to a permanent establishment are to be determined on the basis of a deemed profit, nothing in paragraph 2 shall preclude that Contracting State from applying those provisions of its law, provided that the result is in accordance with the principles contained in this Article.

4. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere in accordance with the provisions of tax law of that Contracting State.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of paragraphs 1 to 5, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

ARTICLE 8

Shipping and Air Transport

1. Profits derived by an enterprise which is a resident of a Contracting State from the operation by that enterprise of ships or aircraft in international traffic shall be taxable only in that Contracting State.

2. For the purposes of this Article, profits from the operation of ships or aircraft in international traffic shall mean profits derived by an enterprise described in paragraph 1 from the transportation by sea or air respectively of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of ships or aircraft including :

(a) the sale of tickets for such transportation;

(b) the rental of ships or aircraft connected with such transportation; and

(c) income from use, maintenance, or rental of containers (including

trailers, barges, and related equipment for the transport of containers) operated in international traffic.

3. For the purposes of this Article, interest on funds directly connected with the operation of ships or aircraft in international traffic shall be regarded as profits described in this Article, and the provisions of Article 11 (Interest) shall not apply in relation to such interest.

4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

ARTICLE 9

Associated Enterprises

1. Where

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of the enterprise of the other Contracting State, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting State includes in the profits of an enterprise of that Contracting State—and taxes accordingly profits on which an enterprise of the other Contracting State has been charged to tax in that other Contracting State, and the profits so included are profits which would have accrued to the enterprise of the first mentioned Contracting State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of tax charged therein on those profits. In determining such adjustment, due regard shall be had to the provisions of the Agreement and the competent authorities of the Contracting States shall, if necessary, consult each other.

ARTICLE 10

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other Contracting State.

2. However, such dividends may also be taxed in the Contracting State

of which the company paying the dividends is a resident and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed 10 per cent of the gross amount of the dividends. The provisions of this paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, or other rights, not being debit claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base, in such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Where a company which is a resident of a contracting State derives profits or income from the other Contracting State, that other Contracting State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other Contracting State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other Contracting State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other Contracting State.

ARTICLE 11

Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraph 2, interest in a Contracting State and derived by the Government of the other Contracting State, a political subdivision, a local authority and the Central Bank thereof or any financial institution wholly owned by that Government, or by any other

resident of that other Contracting State with respect to debt-claims indirectly financed by the Government of that other Contracting State, a political subdivision, a local authority, and the Central Bank thereof or any financial institution wholly owned by that Government shall be exempt from tax in the first-mentioned Contracting State.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and price attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is the Government of that Contracting State, a political subdivision, a local authority thereof or a resident of that Contracting State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is plaid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 13

Capital Gains

1. Gains derived by a resident of a Contracting State from the alienation

of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other Contracting State.

2. Gains from the alienation of movable property forming part of business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other Contracting State.

3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that Contracting State.

5. Gains from the alienation of any property other than that referred to in the preceding paragraphs of this Article, arising in a Contracting State, may be taxed in that Contracting State.

ARTICLE 14

Independent Personal Services

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that Contracting State except in one of the following circumstances, when such income may also be taxed in the other Contracting State :

(a) If he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State;

(b) if his stay in the other Contracting State is for a period or periods exceeding in the aggregate 183 days in the taxable year concerned; in that case, only so much of the income as is derived from his activities performed in that other Contracting State may be taxed in that other Contracting State.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

ARTICLE 15

Dependent Personal Services

Subject to the provisions of Articles 16, 18, 19, 20 and 21, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that Contracting State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other Contracting State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if :

(a) the recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate 183 days in the taxable year concerned; and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other Contracting State; and

(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other Contracting State.

3. Notwithstanding the provisions of paragraphs 1 and 2, of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated by an enterprise which is a resident of a Contracting State in international traffic shall be taxable only in that Contracting State.

ARTICLE 16

Directors' Fees

Notwithstanding the provisions of Article 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from his personal activities as such exercised in the other Contracting State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of Article 7, 14 and 15, be taxed i the Contracting State in which the activities of the entertainer or sportsperson are exercised.

3. Notwithstanding the provisions 1 and 2, income derived by entertainers or sportspersons who are residents of a Contracting State from the activities exercised in the other Contracting State either as a part of cultural exchange between the Contracting States or supported wholly or substantially from the public funds in either of the Contracting States or political subdivisions or local authorities thereof, shall be exempt from tax in that other Contracting State.

ARTICLE 18

Pensions

1. Subject to the provisions of paragraph 2 of Article 19, pensions, annuity and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that Contracting State.

2. Notwithstanding the provisions of paragraph 1, pensions, annuity paid and other similar payments made by the Government of a Contracting State or a political subdivision or a local authority thereof under a public welfare schemes of the social security system of that Contracting State shall be taxable only in that Contracting State.

ARTICLE 19

Remuneration and Pensions in respect of Government Services

1. (a) Remuneration, other than pension, paid by the Government of a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to the Government of that Contracting State or a political subdivision or a local authority thereof, in the discharge of functions of a governmental nature, shall be taxable only in that Contracting State.

(b) However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that other Contracting State and the individual is a resident of that other Contracting State who :

(i) is a national of that other Contracting State; or

(ii) did not become a resident of that other Contracting State solely for the purpose of rendering the services.

2. (a) Any pension paid by, or out of fund to which contributions are made by the Government of a Contracting State or a political subdivisions or a local authority thereof to an individual in respect of services rendered to the Government of that Contracting State or a political subdivision or a local authority thereof shall be taxable only in that Contracting State.

(b) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of and a national of, that other Contracting State.

3. The provisions of Articles 15, 16, 17 and 18 shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by the Government of a Contracting State or a political subdivision or a local authority thereof.

ARTICLE 20

Payments received by Professors, Teachers and Research Scholars

1. An individual who is, or immediately before visiting a Contracting State was, a resident of the other Contracting State for the primary purpose of teaching, giving lectures or conducting research at a university, college, school or educational institution or scientific research institution approved by the Government of the first-mentioned Contracting State shall be exempt from tax in the first-mentioned Contacting State, for a period of three years from the date of his first arrival in the first-mentioned Contracting State, in respect of remuneration for such teaching, lectures or research.

2. This Article shall not apply to income from research if such research is undertaken primarily for the private benefit of a specific person or persons.

ARTICLE 21

Payments received by Students, Trainees and Apprentices

1. A student, business apprentice or trainee who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of his education, training shall be exempt from tax in that first-mentioned State on the following payments or income received or derived by him for the purpose of his maintenance, education or training :

(a) payments derived from sources outside that Contracting State for the purpose of his maintenance, education, study, research or training;

(b) grants, scholarships or awards supplied by the Government, or a scientific, educational, cultural or other tax-exempt organisation; and

(c) income derived from personal services performed in that Contracting State for the purpose of maintenance.

2. The benefits of this Article shall extend only for such period of time as may be reasonable or customarily required to complete the education or training undertaken, but in no event shall any individual have the benefits of this Article, for more than five consecutive years from the date of his first arrival in that Contracting State.

ARTICLE 22

Other Income

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that Contracting State.

2. The provisions of paragraph 1 shall not apply to income, other than

income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Agreement and arising in the other Contracting State may be taxed in that other Contracting State.

ARTICLE 23

Methods for the Elimination of Double Taxation

1. In China, double taxation shall be eliminated as follows :

(a) Where a resident of China derives income from India the amount of tax on that income payable in India in accordance with the provisions of this Agreement, may be credited against the Chinese tax imposed on that resident. The amount of credit, however, shall not exceed the amount of the Chinese tax on that income computed in accordance with the taxation laws and regulations of China.

(b) Where the income derived from India is a dividend paid by a company which is a resident of India to a company which is a resident of China and which owns not less than 10 per cent of the shares of the company paying the dividend, the credit shall take into account the tax paid to India by the company paying the dividend in respect of its income.

2. In India, double taxation shall be eliminated as follows :

Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in China, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in China whether directly or by deduction. Such deduction shall not, however, exceed that part of income-tax (as computed before the deduction is given) which is attributable, as the case may be, to the income which may be taxed in China.

3. The tax paid in a Contracting State mentioned in paragraphs 1 and 2 of this Article shall be deemed to include the tax which would have been payable but for the legal provisions concerning tax reduction, exemption or other tax incentives of the Contracting States for the promotion of economic development.

ARTICLE 24

Non-discrimination

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that Contracting State in the same circumstances are or may be subjected.

2. The taxation on permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other Contracting State than the taxation levied on enterprises of that other Contracting State carrying on the same activities in the same circumstances or under the same conditions.

3. Where a Contracting State charges the profits of a permanent establishment which an enterprise of the other Contracting State has in the first-mentioned Contracting State at a rate of tax which is different from that imposed on the profits of a similar enterprise of the first-mentioned Contracting State, it shall not be construed as discrimination under this Article.

4. Nothing contained in this Article shall be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and deductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

5. Except where the provisions of paragraph 1 of Article 9, paragraph 7 of Article 11, or paragraph 7 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State subject to the provisions of domestic laws of that Contracting State.

6. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected in the same circumstances and under the same conditions.

7. In this Article, the term "taxation" means taxes which are the subject of this Agreement.

ARTICLE 25

Mutual Agreement Procedure

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance

with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraphs 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the provisions of this Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.

4. The competent authorities of the Contracting States may communicate with each other direct for the purpose of reaching an agreement in the sense of paragraphs 2 and 3. When it seems advisable for reaching agreement, representatives of the competent authorities of the contracting States may meet together for an oral exchange of opinions.

ARTICLE 26

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information (including documents) as is necessary for carrying out the provisions of this Agreement or of the domestic laws of the Contracting States concerning taxes covered by the Agreement, insofar as the taxation thereunder is not contrary to this Agreement., in particular for the prevention of evasion of such taxes. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as secret and shall be disclosed only to persons or authorities (including Courts and administrative bodies) involved in the assessment or collection of the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public Court proceedings or in judicial decisions.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information or documents which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information or documents which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

ARTICLE 27

Diplomatic Agents and Consular Officers

Nothing in this Agreement shall effect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.

ARTICLE 28

Entry into Force

This Agreement shall enter into force on the thirtieth day after the the on which diplomatic notes indicating the completion of internal legal procedures necessary in each country for the entry into force of this Agreement have been exchanged. This Agreement shall have effect :

(a) in China, in respect of income arising in any taxable year beginning on or after the first day of January next following the calendar year in which this Agreement enters into force;

(b) in India, in respect of income arising in any previous year beginning on or after the first day of April next following the calendar year in which this Agreement enters into force.

ARTICLE 29

Termination

This Agreement shall remain in force indefinitely but either of the Contracting States may, or before the thirtieth day of June in any calendar year beginning after the expiration of a period of five years from the date of its entry into force, give written notice of termination to the other Contracting State through the diplomatic channels. In such event this Agreement shall cease to have effect :

(a) in China, in respect of income arising in any taxable year beginning on or after the first day of January next following the calendar year in which the notice of termination is given;

(b) in India, in respect of income arising in any previous year beginning on or after the first day of April next following the calendar year in which the notice is given.

In witness whereof, the undersigned, being duly authorised thereto, have signed the present Agreement.

Done in duplicate at New Delhi on this eighteenth day of July one thousand nine hundred and ninety four in the Hindi, Chinese and English languages, all three texts being equally authentic. In case of any divergence, the English text shall prevail.

Sd./-	Sd./-
(Dr.) Manmohan Singh	....
For the Government of the	For the Government of the
Republic of India	People's Republic of China

PROTOCOL

At the signing of the Agreement between the Government of the Republic of India and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (hereinafter referred to as "The Agreement") both sides have agreed upon the following provisions which form an integral part of the Agreement :

1. With reference to paragraph (d) of Article 3 :

It is understood that the term "tax" should not include any penalty imposed for non-compliance of the laws and regulations relating to the taxes to which this Agreement applies.

2. With reference to Article 8, the exemption shall also include :

(i) in China, the business tax;

(ii) in India, any tax similar to the business tax in China which may be imposed in India after signing of the Agreement.

3. With reference to Article 26 :

The competent authorities of the Contracting States shall agree from time to time on the information or documents which shall be necessarily furnished on a routine basis.

In witness whereof, the undersigned, being duly authorised thereto, have signed the present Protocol.

Done in duplicate at New Delhi on this eighteenth day of July one thousand

nine hundred and ninety four in the Hindi, Chinese and English languages, all three texts being equally authentic. In case of any divergence, the English text shall prevail.

Sd./-	Sd./-
(Dr.) Manmohan Singh	....
For the Government of the Republic of India	For the Government of the People's Republic of China

[F. No. 503/5/93FTD, dt. 5th April, 1995]

STATUTE

THE FINANCE ACT, 1995

An Act to give effect to the financial proposals of the Central Government for the financial year 1995-96.

Be it enacted by Parliament in the Forty-sixth Year of the Republic of India as follows :-

CHAPTER I
PRELIMINARY

Short title and commencement

1. *(1)* This Act may be called the Finance Act, 1995.

(2) Save as otherwise provided in this Act, sections 2 to 49 shall be deemed to have come into force on the 1st day of April, 1995.

CHAPTER II
RATES OF INCOME-TAX

Income-tax

2. *(1)* Subject to the provisions of sub-sections *(2)* and *(3)*, for the assessment year commencing on the 1st day of April, 1995, income-tax shall be charged at the rates specified in Part I of the First Schedule and such tax shall be increased in the cases to which Paragraph E of that Part applies, by a surcharge, calculated in the manner provided therein.

(2) In the cases to which Sub-Paragraph I or Sub-Paragraph II of Paragraph A of Part I of the First Schedule applies, where the assessee has, in the previous year, any net agricultural income exceeding six hundred rupees, in addition to total income, and the total income exceeds, -

(i) in a case to which he said Sub-Paragraph I applies, thirty-five thousand rupees, and

(ii) in a case to which the said Sub-Paragraph II applies, eighteen thousand rupees,

then, -

(a) the net agricultural income shall be taken into account, in the manner provided in clause *(b)* [that is to say, as if the net agricultural income were comprised in the total income after, -

(i) in a case to which the said Sub-Paragraph I applies, the first thirty-five thousand rupees, and

(ii) in a case to which the said Sub-Paragraph II applies, the first eighteen thousand rupees,

of the total income but without being liable to tax], only for the purpose of charging income-tax in respect of the total income; and

(b) the income-tax chargeable shall be calculated as follows :-

(i) the total income and the net agricultural income shall be aggregate and the amount of income-tax shall be determined in respect of th aggregate income at the rates specified in Sub-Paragraph I or, as th case may be, Sub-Paragraph II of the said Paragraph A, as if suc aggregate income were the total income;

(ii) the net agricultural income shall be increased, -

(A) in a case to which the said Sub-Paragraph I applies, by a sur of thirty-five thousand rupees; and

(B) in a case to which the said Sub-Paragraph II applies, by sur of eighteen thousand rupees,

and the amount of income-tax shall be determined in respect of th net agricultural income as so increased at the rates specified in Sul Paragraph I or, as the case may be, Sub-Paragraph II of the sa Paragraph A, as if the net agricultural income as so increased wer the total income;

(iii) the amount of income-tax determined in accordance with sul clause (i) shall be reduced by the amount of income-tax determined i accordance with sub-clause (ii) and the sum so arrived shall be the incom tax in respect of the total income.

(3) In cases to which the provisions of Chapter XII or Chapter XII-A or sul section (1A) of section 161 or section 164 or section 164A or section 167B the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as Income-tax Ac apply, the tax chargeable shall be determined as provided in that Chapter or th section, and with reference to the rates imposed by sub-section (1) or the rates specified in that Chapter or section, as the case may be :

Provided that the amount of income-tax computed in accordance with th provisions of section 112 shall be increased in the case of a domestic compar by a surcharge as provided in Paragraph E of Part I of the First Schedule :

Provided further that in respect of any income chargeable to tax under sectic 115B, or in the case of a domestic company having a total income exceedir seventy-five thousand rupees, under section 115BB, of the Income-tax Act, th income-tax computed shall be increased by a surcharge calculated at the rate fifteen per cent of such income-tax.

(4) In cases in which tax has to be deducted under sections 193, 194, 194 194B, 194BB, 194D and 195 of the Income-tax Act at the rates in force, th deduction shall be made at the rates specified in Part II of the First Schedule ar shall be increased in the cases to which the provisions of sub-item (a) of item 2 that Part apply, by a surcharge, calculated in the manner provided therein.

(5) In cases in which tax has to be deducted under sections 194C, 194G, 19 I, 194J and 194K of the Income-tax Act, the deduction shall be made at the rat specified in those sections and shall be increased in the case of an assessee, beir

a domestic company, by a surcharge calculated at the rate of fifteen per cent of such deduction.

(6) In cases in which tax has to be collected under section 206C of the Income-tax Act, the collection shall be made at the rate specified in that section and shall be increased in the case of a buyer, being a domestic company, by a surcharge calculated at the rate of fifteen per cent of such collection.

(7) Subject to the provisions of sub-section *(8)*, in cases in which income-tax has to be calculated under the first proviso to sub-section *(5)* of section 132 of the Income-tax Act or charged under sub-section *(4)* of section 172 or sub-section (2) of section 174 or section 175 or sub-section (2) of section 176 of the said Act or deducted under section 192 of the said Act from income chargeable under the head "Salaries" or in which the "advance tax" payable under Chapter XVII-C of the said Act has to be computed, at the rate or rates in force, such income-tax or, as the case may be, "advance tax" shall be so calculated, charged, deducted or computed at the rate or rates specified in Part III of the First Schedule and such tax shall be increased in the cases to which Paragraph E of that Part applies, by a surcharge, calculated in the manner provided therein:

Provided that in cases to which the provisions of Chapter XII or Chapter XII-A or sub-section *(1A)* section 161 or section 164 or section 164A or section 167B of the Income-tax Act apply, "advance tax" shall be computed with reference to the rates imposed by this sub-section or the rates as specified in that Chapter or section, as the case may be:

Provided further that the amount of income-tax computed in accordance with the provisions of sections 112 and 113 shall be increased in the case of a domestic company by a surcharge as provided in Paragraph E of Part II of the First Schedule:

Provided also that in respect of any income chargeable to tax under section 115B, or in the case of a domestic company, under section 115BB, of the Income-tax Act, having in either case a total income exceeding seventy-five thousand rupees, the "advacne tax" computed under the first proviso shall be increased by a surcharge calculated at the rate of fifteen per cent of such "advance tax".

(8) In the cases to which Sub-Paragraph I or Sub-Paragraph II of Paragraph A of Part III of the First Schedule applies, where the assessee has, in the previous year or, if by virtue of any provision of the Income-tax Act, income-tax is to be charged in respect of the income of a period other than the previous year, in such other period, any net agricultural income exceeding six hundred rupees, in addition to total income and the total income exceeds,—

(i) in a case to which the said Sub-Paragraph I applies, forty thousand rupees, and

(ii) in a case to which the said Sub-Paragraph II applies, eighteen thousand rupees,

then in calculating income-tax under the first proviso to sub-section *(5)* of section 132 of the Income-tax Act or in chargino income-tax under sub-section *(2)*

of section 174 or section 175 or sub-section *(2)* of section 176 of the said Act or in computing the "advance tax" payable under Chapter XVII-C of the said Act, at the rate or rates in force,—

(a) the net agricultural income shall be taken into account, in the manner provided in clause (b) [that is to say, as if the net agricultural income were comprised in the total income after,—

(i) in a case to which the said Sub-Paragraph I applies, the first forty thousand rupees, and

(ii) in a case to which the said Sub-Paragraph II applies, the first eighteen thousand rupees,

of the total income but without being liable to tax], only for the purpose of calculating, charging or computing such income-tax or, as the case may be, "advance tax" in respect of the total income; and

(b) such income-tax or, as the case may be, "advance tax" shall be so calculated, charged or computed as follows:—

(i) the total income and the net agricultural income shall be aggregated and the amount of income-tax or "advance tax" shall be determined in respect of the aggregate income at the rates specified in Sub-Paragraph I or, as the case may be, Sub-Paragraph II of the said Paragraph A, as if such aggregate income were the total income;

(ii) the net agricultural income shall be increased,—

(A) in a case to which the said Sub-Paragraph I applies, by sum of forty thousand rupees; and

(B) in a case to which the said Sub-Paragraph II applies, by a sum of eighteen thousand rupees,

and the amount of income-tax or "advance tax" shall be determined in respect of the net agricultural income as so increased at the rates specified in the said Sub-Paragraph I or, as the case may be, the said Sub-Paragraph II as if the net agricultural income as so increased were the total income;

(iii) the amount of income-tax or "advance tax" determined in accordance with sub-clause *(i)* shall be reduced by the amount of income-tax or, as the case may be, "advance tax" determined in accordance with sub-clause *(ii)* and the sum so arrived at shall be the income-tax or, as the case may be, "advance tax" in respect of the total income.

(9) For the purposes of this section and the First Schedule, -

(a) "domestic company" means an Indian company, or any other company which, in respect of its income liable to income-tax under the Income-tax Act for the assessment year commencing on the 1st day of April, 1995, has made the prescribed arrangements for the declaration and payment within India of the dividends (including dividends on preferance shares)

payable out of such income in accordance with the provisions of section 194 of the Act;

(b) "insurance commission" means any remuneration or reward, whether by way of commission or otherwise, for soliciting or procuring insurance business (including business relating to the continuance, renewal or revival of policies of insurance);

(c) "net agricultural income", in relation to a person, means the total amount of agricultural income, from whatever source derived, of that person computed in accordance with the rules contained in Part IV of the Fist Schedule;

(d) all other words and expressions used in this section or in the First Schedule but not defined in this sub-section and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.

CHAPTER III

DIRECT TAXES

Income-tax

Amendment of section 2

3. In section 2 of the Income-tax Act, in clause (42A), in *Explanation 1*, in clause (i), after sub-clause *(e)*, the following sub-clause shall be inserted, with effect from the 1st day of April, 1996, namely:-

"(f) in the case of a capital asset, being a financial asset, allotted without any payment and on the basis of holding of any other financial asset, the period shall be reckoned from the date of the allotment of such financial asset;"

Amendment of section 10

4. In section 10 of the income-tax Act,—

(1) in clause (10D), after the words "such policy", the words, brackets, figures and letters "other than any sum received under sub-section (3) of section 80DDA" shall be inserted with effect from the 1st day of April 1996;

(2) in clause (14), with effect from the 1st day of July, 1995, -

(a) in sub-clause (i), for the words "as the Central Government may, by notification in the Official Gazette, specify", the words "as may be prescribed" shall be substituted;

(b) in sub-clause (ii), for the words "as the Central Government may, by notification in the Official Gazette, specify, to the extent specified in the notification", the words "as may be prescribed and to the extent as may be prescribed" shall be substituted;

(3) in clause (15), for sub-clause (v), the following sub-clause shall be substituted, namely:-

'*(v)* interest on -

(a) securities held by the Welfare Commissioner, Bhopal Gas Victims, Bhopal, in the Reserve Bank's SGL Account No. SL/DH048;

(b) deposit. for the benefit of the victims of the Bhopal gas leak disaster held in such account, with the Reserve Bank of India or with a public sector bank, as the Central Government may, by notification in the Official Gazette, specify, whether prospectively or retrospectively but in no case earlier than the 1st day of April, 1994 in this behalf.

Explanation.- For the purposes of this sub-clause, the expression "public sector bank" shall have the meaning assigned to it in the *Explanation* to clause (23D)';

(4) for clause (15A), the following clause shall be substituted with effect from the 1st day of April, 1996, namely:-

'(15A) any payment made, by an Indian company engaged in the business of operation of aircraft, to acquire an aircraft or any aircraft engine (other than a payment for providing spares, facilities or service in connection with the operation of leased aircraft) on lease from the Government of a foreign State or a foreign enterprise under an agreement approved by the Central Government in this behalf.

Explanation.- For the purposes of this clause, the expression "foreign enterprise"means a person who is a non-resident;

(5) after clause (23AA), the following clause shall be inserted, with effect from the 1st day of April, 1996, namely :-

"(23AAA) any income received by any person on behalf of a fund established, for such purposes as may be notified by the Board in the Official Gazette, for the welfare of employees or their dependants and of which fund such employees are also members if such fund fulfills the following conditions, namely :-

(a) the fund -

(i) applies its income, or accumulates it for application, wholly and exclusively to the objects for which it is established; and

(ii) invests its funds and contributions and other sums received by it in the forms or modes specified in sub-section (5) of section 11;

(b) the fund is approved by the Commissioner in accordance with the rules made in this behalf :

Provided that any such approval shall at any one time have effect for such assessment year or years not exceeding three assessment years as may be specified in the order of approval;"

(6) in clause (23), for the portion beginning with the words "any income of such Mutual Fund" and ending with the words "specify in this behalf", the following shall be substituted with effect from the 1st day of July, 1995, namely:-

"any income of -

(i) a Mutual Fund registered under the Securities and Exchange Board of India Act, 1992 or regulations made thereunder;

(ii) such other Mutual Fund set up by a public sector bank or a public financial institution or authorised by the Reserve Bank of India and subject to such conditions as the Central Government may, by notification in the Official Gazette, specify in this behalf";

(7) after clause (23E), the following clause shall be inserted with effect from the 1st day of April, 1996, namely: -

"(23F) any income by way of dividends or long-term capital gains of a venture capital fund or a venture capital company from investments made by way of equity shares in a venture capital undertaking:

Provided that such venture capital fund or venture capital company is approved for the purposes of this clause by the prescribed authority in accordance with the rules made in this behalf and satisfies the prescribed conditions :

Provided further that any approval by the prescribed authority shall, at any one time, have effect for such assessment year or years, not exceeding three assessment years, as may be specified in the order of approval:

Provided also that if the aforesaid equity shares are transferred (other than in the event of the said shares being listed in a recognised stock exchange in India) by a venture capital fund or a venture capital company to any person at any time within a period of three years from the date of their acquisition, the aggregate amount of income by way of dividends on such equity shares which has not been included in the total income of the previous year or years preceding the previous year in which such transfer has taken place shall be deemed to be the income of the venture capital fund or of the venture capital company of the previous year in which such transfer has taken place :

Provided also that the exemption shall not be allowed in respect of the long-term capital gains, if any, arising on such transfer of equity shares as is mentioned in the third proviso.

Explanation.- For the purposes of this clause, -

(a) "venture capital fund" means such fund, operating under a trust deed registered under the provisions of the Registration Act, 1908 (16 of 1908), established to raise moneys by the trustees for investments mainly by way of acquiring equity shares of a venture capital undertaking in accordance with the prescribed guidelines;

(b) "venture capital company" means such company as has made investments by way of acquiring equity shares of venture capital undertakings in accordance with the prescribed guidelines; and

(c) "venture capital undertaking" means such domestic company whose shares are not listed in a recognised stock exchange in India and which is engaged in the manufacture or production of such articles or things (including

computer software) as may be notified by the Central Government in this behalf.'

(8) after clause (25), the following clause shall be inserted and shall be deemed always to have been inserted with effect from the 1st day of April, 1962, namely:-

"(25A) any income of the Employees' State Insurance Fund set up under the provisions of the Employees 'State Insurance Act, 1948 (34 of 1948);"

(9) after clause (26B), the following clause shall be inserted, namely:-

'(26BB) any income of a corporation established by the Central Government or any State Government for promoting the interests of the members of a minority community.

Explanation.- For the purposes of this clause, "minority community" means a community notified as such by the Central Government in the Official Gazette in this behalf;'

Amendment of section 10A

5. In section 10A of the Income-tax Act, in sub-section (2), after clause (i), the following clause shall be inserted with effect from the 1st day of April, 1996, namely:-

"*(ia)* in relation to an undertaking which begins to manufacture or produce any article or thing on or after the 1st day of April, 1995, its exports of such articles or things are not less than seventy-five per cent. of the total sales thereof during the previous year;"

Amendment of section 17

6. In section 17 of the Income-tax Act, in clause (3), in sub-clause (ii), with effect from the 1st day of April, 1996,-

(a) after the word, brackets and figures "clause (12)", the word, brackets and figures", clause (13)' shall be inserted;

(b) the brackets and words "(not being an approved superannuation fund)"shall be omitted.

Amendment of section 32

7. In section 32 of the Income-tax Act, in sub-section (1), with effect from the 1st day of April, 1996, -

(a) the first proviso shall be omitted;

(b) in the second proviso, the word "further" shall be omitted;

(c) in the third proviso, for the word "also", the word "further" shall be substituted.

Amendment of section 33AC

8. In section 33AC of the Income-tax Act, in sub-section (1), for the portion beginning with the words "in the case of an assessee" and ending with the words,

brackets and figure "manner laid down in sub-section (2)", the following shall be substituted with effect from the 1st day of April, 1996, namely:-

'In the case of an assessee, being a Government company or a public company formed and registered in India with the main object of carrying on the business of operation of ships, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction of an amount not exceeding fifty per cent of profits derived from the business of operation of ships (computed under the head "Profits and gains of business or profession"and before making any deduction under this section), as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account, to be utilised in the manner laid down in sub-section (2):'

Amendment of section 35CCA

9. In section 35CCA of the Income-tax Act, in sub-section *(1)*, with effect from the 1st day of April, 1996, -

(a) in clause *(c)*, for the word "behalf,",the words "behalf; or" shall be substituted;

(b) after clause *(c)*, the following clause shall be inserted, namely: -

(d) to the National Urban Poverty Eradication Fund set up and notified by the Central Government in this behalf,".

Amendment of section 36

10. In section 36 of the Income-tax Act, in sub-section *(1)*, in clause (viii), with effect from the 1st day of April, 1996, -

(a) for the portion beginning with the words "industrial or agricultural development in India" and ending with the words "such reserve account", the following shall be substituted, namely :-

'industrial or agricultural development or development of infrastructure facility in India or by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes, an amount not exceeding forty per cent. of the profits derived from such business of providing long-term finance (computed under the head "Profits and gains of business or profession" before naking any deduction under this section carried to such reserve account:'

(b) in the *Explanation*, after clause *(c)*, the following clause shall be inserted, namely :-

'*(d)* "infrastructure facility" shall have the meaning assigned to it in section 80-IA.'

Amendment of section 40A

11. In section 40A of the Income-tax Act, in sub-section (3), for the words

"such expenditure shall not be allowed as a deduction", the words "twenty per cent of such expenditure shall not be allowed as a deduction" shall be substituted with effect from the 1st day of April, 1996.

Amendment of section 43

12. In section 43 of the Income-tax Act, in sub-section (3), for the words "business or profession", the words "but does not include tea bushes or livestock" shall be inserted and shall be deemed always to have been inserted with effect from the 1st day of April, 1962.

Amendment of section 44AB

13. In section 44AB of the Income-tax Act, with effect from the 1st day of July, 1995,-

(a) for the words "obtain before", the words "furnish by" shall be substituted;

(b) in the first proviso, the words, figures, and letters "section 44AC or" shall be omitted;

(c) in the second proviso, for the words "obtains before", the words "furnishes by" shall be substituted

Amendment of section 55

14. In section 55 of the Income-tax Act, in sub-section (2), in clause (aa), with effect from the 1st day of April, 1996, -

(i) for the portion beginning with the words "in a case where" and ending with the words, brackets, figures and letter "sub-clauses (i) and (ii) of clause (b)", the following shall be substituted, namely:-

"in a case where, by virtue of holding a capital asset, being a share or any other security, within the meaning of clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) (hereafter in this clause referred to as the financial asset), the assessee-

(A) becomes entitled to subscribe to any additional financial asset; or

(B) is allotted any additional financial asset without any payment,

then, subject to the provisions of sub-clauses *(i)* and *(ii)* of clause *(b)*";

(i) after sub-clause (iii), the following sub-clause shall be inserted, namely:-

"*(iiia)* in relation to the financial asset allotted to the assessee without any payment and on the basis of holding of any other financial asset, shall be taken to be nil in the case of such assessee;"

Insertion of new section 80DDA

15. After section 80DD of the Income-tax Act, the following section shall be inserted, with effect from the 1st day of April, 1996, namely :-

Deduction in respect of deposit made for maintenance of handicapped dependant

'80DDA. *(1)* In computing the total income of an assessee who is resident in India, being an individual or a Hindu undivided family, there shall be deducted, in accordance with and subject to the provisions of this section, an amount not exceeding twenty thousand rupees paid or deposited by him in the previous year, out of his income chargeable to tax, under any scheme framed in this behalf by the Life Insurance Corporation or the Unit Trust of India subject to the conditions specified in sub-section (2) and approved by the Board in this behalf.

(2) The deduction under sub-section *(1)* shall be allowed only if the following conditions are fulfilled, namely :-

(a) the scheme referred to in sub-section *(1)* provides for payment of annuity or lump sum amount for the benefit of a handicapped dependant in the event of the death of the individual or the member of the Hindu undivided family in whose name subscription to the scheme has been made;

(b) the assessee nominates either the handicapped dependant or any other person or a trust to receive the payment on his behalf, for the benefit of the handicapped dependant.

(3) If the handicapped dependant predeceases the individual or the member of the Hindu undivided family referred to in sub-section (2), an amount equal to the amount paid or deposited under sub-section (1) shall be deemed to be the income of the assessee of the previous year in which such amount is received by the assessee and shall accordingly be chargeable to tax as the income of that previous year.

(4) In this section, -

(a) "Government hospital" shall have the meaning assigned to it in the *Explanation* to section 80DD;

(b) "handicapped dependant" shall mean a person who -

(i) is a relative of the individual or, as the case may be, is a member of the Hindu undivided family and is not dependant on any person other than such individual or Hindu undivided family for his support or maintenance; and

(ii) is suffering from permanent physical disability (including blindness) or is subject to mental retardation, being a permanent physical disability or mental retardation specified in the rules made by the Board for the purposes of section 80DD, which is certified by a physician, a surgeon, an oculist or a psychiatrist, as the case may be, working in a Government hospital, and which has the effect of reducing considerably such person's capacity for normal work or engaging in a gainful employment or occupation;

(c) "Life Insurance Corporation" shall have the same meaning as in clause (iii) of sub-section (8) of section 88;

(d) "Unit Trust of India" means the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963).'

Amendment of section 80G

16. In section 80G of the Income-tax Act, -

(a) in sub-section (1), in clause (i), after the words, brackets, figures and letter "sub-clause (iiig) or", the words, brackets, figures and letter "sub-clause (iiih) or" shall be inserted with effect from the 1st day of April, 1996;

(b) in sub-section (2), in clause (a),-

(i) after sub-clause (iiig), the following sub-clause shall be inserted with effect from the 1st day of April, 1996, namely :-

'*(iiih)* any Zila Saksharta Samiti constituted in any district under the chairmanship of the Collector of that district for the purposes of improvement of primary education in villages and towns in such district and for literacy and post-literacy activities.

Explanation.- For the purposes of this sub-clause, "town" means a town which has a population not exceeding one lakh according to the last preceding census of which the relevant figures have been published before the first day of the previous year; or';

(ii) after sub-clause (vi), the following sub-clause shall be inserted, namely:-

"*(via)* any corporation referred to in clause (26BB) of section 10; or";

(c) in sub-section (4), for the brackets, figures and word "(vi) and (vii)", the brackets, figures, letter and word "(vi), (via) and (vii)' shall be substituted.

Amendment of section 80GGA

17. In section 80GGA of the Income-tax Act, in sub-section (2), after clause (D), the following clause shall be inserted with effect from the 1st day of April, 1996, namely:-

"(e) any sum paid by the assessee in the previous year to the National Urban Poverty Eradication Fund set up and notified by the Central Government for the purpose of clause (d) of sub-section (1) of section 35CCA."

Amendment of section 80HHE

18. In section 80HHE of the Income-tax Act, in sub-section (1), the proviso shall be omitted with effect from the 1st day of April, 1996.

Amendment of section 80-IA

19. In section 80-IA of the Income-tax Act, with effect from the 1st day of April, 1996,-

(a) in sub-section *(1)*, for the words and brackets "operation of a ship (such business being hereinafter referred to as the eligible business)", the words and brackets "operating of a ship or developing, maintaining and operating any

infrastructure facility (such business being hereinafter referred to as the eligibl business)" shall be substituted;

(b) in sub-section *(2)*, in clause *(iv)*, after sub-clause *(c)*, the following sub clause shall be inserted, namely:-

"(d) in the case of an industrial undertaking being a small scale industria undertaking, not specified in sub-clause (b) or in sub-clause (c), it begins manufacture or produce articles or things or to operate its cold storage plan at any time during the period beginning on the 1st day of April, 1995 an ending on the 31st day of March, 2000";

(c) after sub-section *(4)*, the following sub-section shall be insertec namely:-

"*(4A)* This section applies to any enterprise carrying on the business c developing, maintaining and operating any infrastructure facility which fulfil all the following conditions, namely:-

(i) the enterprise is owned by a company registered in India or by consortium of such companies;

(ii) the enterprise has entered into an agreement with the Centr Government or a State Government or a local authority or any othe statutory body for developing, maintaining and operating a new infr structure facility subject to the condition that such infrastructure facilit shall be transferred to the Central Government, State Government, loc authority or such other statutory body, as the case may be, within a peric stipulated in the agreement;

(iii) the enterprise starts operating and maintaining the infrastructur facility on or after the 1st day of April 1995".

(d) in sub-section (5).-

(i) in clause (i), in sub-clause (a), after the words, brackets and lette "sub-clause (a)", the words, brackets and letter "or sub-clause (d)" shall inserted;

(ii) after clause (i), the following clause shall be inserted, namely:-

"*(ia)* in the case of an enterprise referred to in sub-section (4A), hundred p cent of the profits and gains derived from such business for the initial fiv assessment years and thereafter, thirty per cent of such profits and gains;"

"(e) in sub-section (6), *after* clause (iii) the following clause shall inserted, namely : —

"(iv) any ten consecutive assessment years falling within a period c twelve assessment years beginning with the assessment year in which a assessee begins operating and maintaining infrastructure facility";

"(f) in sub-section (12)—

(i) for clause (c), the following clause shall be substituted, namely :—

'(c) *"Initial assessment year"*—

(1) in the case of an industrial undertaking or cold storage plant or ship or hotel, means the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things, or to operate its cold storage, plant or plants or the ship is first brought into use or the business of the hotel starts functioning;

(2) in the case of an enterprise, carrying on the business of developing, operating and maintaining any infrastructure facility, means the assessment year specified by the assessee at his option to be the initial year, not falling beyond the twelfth assessment year starting from the previous year in which the enterprise begins operating and maintaining the infrastructure facility'.

Amendment of section 80L

20. In section 80L of the Income-tax Act, in sub-section (1), in clauses (1) and (2), for the words "ten thousand", the words "thirteen thousand" shall be substituted with effect from the 1st day of April, 1996.

Amendment of section 80U

21. In section 80U of the Income-tax Act, for the words "twenty thousand rupees", the words "forty thousand rupees" shall be substituted, with effect from the 1st day of April, 1996.

Amendment of section 88

22. In section 88 of the Income-tax Act, with effect from the 1st day of April, 1996, -

(i) sub-section (3) shall be omitted;

(ii) in sub-section (7), in clause (i), for the words "contract of insurance, before premiums have been paid for two years; or", the following shall be substituted, namely:-

"contract of insurance, -

(a) in case of any single premium policy, within two years after the date of commencement of insurance, or

(b) in any other case, before premiums have been paid for two year; or".

Amendment of section 112

23. In section 112 of the Income-tax Act, in sub-section (1), with effect from the 1st day of April, 1996. -

(i) the proviso at the end of clause (b) shall be omitted;

(ii) the *Explanation*, at the end, shall be omitted.

Insertion of new section 113

24. After section 112 of the Income-tax Act, the following section shall be in[illegible] with [illegible] from th[illegible] 1st [illegible] of J[illegible] 1995 [illegible]

Tax in the case of block assessment of search cases

"113. The total undisclosed income for the block period, determined under section 158BC, shall be chargeable to tax at the rate of sixty per cent."

Amendment of section 115K

25. In section 115K of the Income-tax Act, with effect from the 1st day of April, 1996,-

(a) for the words "forty-two thousand rupees", wherever they occur, the words "forty-seven thousand rupees" shall be substituted;

(b) for the words "five lakh rupees", at both the places where they occur, the words "six lakh rupees" shall be substituted.

Amendment of section 132

26. In section 132, in sub-section (5), after the words, brackets, figure and letter "or sub-section (1A)", the words, figures and letters "as a result of a search initiated or requisition made before the 1st day of July, 1995, "shall be inserted with effect from the 1st day of July, 1995.

Amendment of section 133

27. In section 133 of the Income-tax Act, in clause (6), with effect from the 1st day of July, 1995,-

(a) after the words "will be useful for, or relevant to, any", the words "inquiry or" shall be inserted; and

(b) after the proviso, the following proviso shall be inserted, namely:-

"Provided further that the power in respect of an inquiry, in a case where no proceeding is pending, shall not be exercised by any income-tax authority below the rank of Director or Commissioner without the prior approval of the Director or, as the case may be, the Commissioner."

Amendment of section 133A

28. In section 133A of the Income-tax Act, with effect from the 1st day of July, 1995,-

(a) in sub-section (1), -

(i) in clause (b), the word "or" shall be inserted at the end;

(ii) after clause (b), the following clause shall be inserted, namely:-

"*(c)* any place in respect of which he is authorised for the purposes of this section by such income-tax authority, who is assigned the area within which such place is situated or who exercises jurisdiction in respect of any person occupying such place,"

(b) In the *Explanation* occurring at the end, in clause (a) for the words "a Deputy Commissioner", the words "a Commissioner, a Deputy Commissioner, a Director, a Deputy Director," shall be substituted.

Amendment of section 139

29. In section 139 of the Income-tax Act, with effect from the 1st day of July, 1995,-

(a) in sub-section (6A),-

(i) the words, brackets and figures "sub-sections *(1)* and *(3)* of" shall be omitted;

(ii) for the words, figures and letters "obtained under section 44AB", the words, figures and letters "referred to in section 44AB, or, where the report has been furnished prior to the furnishing of the return, a copy of such report together with proof of furnishing the report" shall be substituted;

(b) in sub-section (9), in the *Explanation,* for clause (bb), the following clause shall be substituted, namely : -

"*(bb)* the return is accompanied by the report of the audit referred to in section 44AB, or, where the report has been furnished prior to the furnishing of the return, by a copy of such report together with proof of furnishing the report;"

Substitution of new section for section 139A.

30. For section 139A of the Income-tax Act, the following section shall be substituted with effect from the 1st day of July, 1995, namely:-

Permanent account number

'139A. (1) Every person,-

(i) if his total income or the total income of any other person in respect of which he is assessable under this Act during any previous year exceeded the maximum amount which is not chargeable to income-tax; or

(ii) carrying on any business or profession whose total sales, turnover or gross receipts are or is likely to exceed fifty thousand rupees in any previous year; or

(iii) who is required to furnish a return of income under sub-section (4A) of section 139,

and who has not been allotted a permanent account number shall, within such time, as may be prescribed, apply to the Assessing Officer for the allotment of a permanent account number.

(2) The Assessing Officer may also allot to any other person by whom tax is payable, a permanent account number.

(3) Any person, not falling under sub-section (1) or sub-section (2), may apply to the Assessing Officer for the allotment of a permanent account number and, thereupon, the Assessing Officer shall allot a permanent account number to such person forthwith.

(4) For the purpose of allotment of permanent account numbers under the new series, the Board may, by notification in the Official Gazette, specify the date from which the persons referred to in sub-sections *(1)* and *(2)* and other persons who have been allotted permanent account numbers and residing in a place to be specified in such notification, shall, within such time as may be specified, apply to the Assessing Officer for the allotment of a permanent account number under the new series and upon allotment of such permanent account number to a person, the permanent account number, if any allotted to him earlier shall cease to have effect:

Provided that the persons to whom permanent account number under the new series has already been allotted shall not apply for such number again.

(5) Every person shall-

(a) quote such number in all his returns to, or correspondence with, any income-tax authority;

(b) quote such number in all challans for the payment of any sum due under this Act;

(c) quote such number in all documents pertaining to such transactions as may be prescribed by the Board in the interests of the revenue, and entered into by him:

Provided that the Board may prescribe different dates for different transactions or class of transactions or for different class of persons;

(d) intimate the Assessing Officer any change in his address or in the name and nature of his business on the basis of which the permanent account number was allotted to him.

(6) Every person receiving any document relating to a transaction prescribed under clause (c) of sub-section (5) shall ensure that the permanent account number has been duly quoted in the document.

(7) No person who has already been allotted a permanent account number under the new series shall apply, obtain or possess another permanent account number.

(8) The Board may make rules providing for-

(a) the form and the manner in which an application may be made for the allotment of a permanent account number and the particulars which such application shall contain;

(b) the categories of transactions in relation to which permanent account numbers shall be quoted by every person in the documents pertaining to such transactions;

(c) the categories of documents pertaining to business or profession in which such numbers shall be quoted by every person.

Explanation.-For the purposes of this section, -

(a) "Assessing Officer" includes an income-tax authority who is assigned the duty of allotting permanent account numbers;

(b) "permanent account number" means a number which the Assessing Officer may allot to any person for the purpose of identification and includes a permanent account number allotted under the new series;

(c) "permanent account number under the new series" means permanent account number having ten alphanumeric characters and issued in the form of a laminated card.'

Substitution of new section for section 145

31. For section 145 of the Income-tax Act, the following sections shall be substituted with effect from the 1st day of April, 1997, namely:-

Method of accounting

'145 *(1)* Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-section *(2)*, be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

(2) The Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assessees or in respect of any class of income.

(3) Where the Assessing Officer is not satisfied abut the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section *(1)* or accounting standards as notified under sub-section *(2)*, have not regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in section 144'. -

Insertion of new Chapter XIV-B

32. In the Income-tax Act, after Chapter XIV-A, the following Chapter shall be inserted with effect from the 1st day of July, 1995, namely:-

'CHAPTER XIV-B

SPECIAL PROCEDURE FOR ASSESSMENT OF SEARCH CASES

Definitions

158B. In this Chapter, unless the context otherwise requires,-

(a) "block period" means the period of ten previous years preceding the previous year in which the search was conducted under section 132 or any requisition was made under section 132A, and includes, in the previous year in which such search was conducted or requisition made, the period up to the date of the commencement of such search or, as the case may be, the date of such requisition;

(b) "undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion,

jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act.

Assessment of undisclosed income as a result of search

158BA. *(1)* Notwithstanding anything contained in any other provisions of this Act, where after the 30th June, 1995 a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

(2) The total undisclosed income relating to the block period shall be charged to tax, at the rate specified in section 113, as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

(3) Where the assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section *(1)* of section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period.

Computation of undisclosed income of the block period

158BB. *(1)* The undisclosed income of the block period shall be the aggregated of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with Assessing Officer, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined,-

(a) where assessments under section 143 or section 144 or section 147 have been concluded, on the basis of such assessments;

(b) where returns of income have been filed under section 139 or section 147 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns;

(c) where the due date for filing a return of income has expired but no return of income has been filed, as nil;

(d) where the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 has not expired, on the basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years;

(e) where any order of settlement has been made under sub-section *(4)* of section 245D, on the basis of such order;

(f) where an assessment of undisclosed income had been made earlier under clause *(c)* of section 158BC, on the basis of such assessment.

Explanation.— For the purposes of determination of undisclosed income,—

(a) the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of Chapter IV without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under sub-section *(2)* of section 32;

(b) of a firm, or its partners, the method of computation of undisclosed income and its allocation to the partners shall be in accordance with the method adopted for determining the assessed income or returned income for each of the previous year falling within the block period;

(c) assessment under section 143 includes determination of income under sub-section (1) or sub-section (1B) of section 143.

(2) In computing the undisclosed income of the block period, the provisions of sections 68, 69, 69A, 69B and 69C shall, so far as may be, apply and references to "financial year" in those sections shall be construed as references to the relevant previous year falling in the block period including the previous year ending with the date of search of the requisition.

(3) The burden of proving to the satisfaction of the Assessing Officer that any undisclosed income had already been disclosed in any return of income filed by the assessee before the commencement of search or of the requisition, as the case may be, shall be on the assessee.

(4) For the purpose of assessment under this Chapter, losses brought forward from the previous year under Chapter VI or unabsorbed depreciation under sub-section (2) of section 32 shall not be set off against the undisclosed income determined in the block assessment under this Chapter, but may be carried forward for being set off in the regular assessments.

Procedure for block assessment

158BC. Where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then,—

(a) the Assessing Officer shall serve a notice to such person requiring him to furnish, within such time, not being less than fifteen days, as may be specified in the notice, a return in the prescribed form and verified in the same manner as a return under clause (i) of sub-section (1) of section 142, setting forth his total income including the undisclosed income for the block period:

Provided that no notice under section 148 is required to be issued for the purposes of proceeding under this Chapter;

(b) the Assessing Officer shall proceed to determine undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 shall, so far as may be, apply;

(c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and determine the tax payable by him on the basis of such assessment;

(d) the assets seized under section 132 or requisitioned under section 132A shall be retained to the extent necessary and the provisions of section 132B shall apply subject to such modifications as may be necessary and the references to "regular assessment" or "reassessment" in section 132B shall be construed as references to "block assessment".

Undisclosed income of any other person

158BD. Where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under section 132 or whose books of account or other documents or any assets were requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and the provisions of this Chapter shall apply accordingly.

Time limit for completion of block assessment

158BE. *(1)* The order under section 158BC shall be passed within one year from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, in the case of an assessee, was executed.

(2) The period of limitation for completion of block assessment in the case of the other person referred to in section 158BD shall be one year from the end of the month in which the notice under this Chapter was served on such other person.

Certain interests and penalties not to be levied or imposed

158BF. No interest under the provisions of sections 234A, 234B or 234C or penalty under the provisions of clause (c) of sub-section (1) of section 271 or section 271A or section 271B shall be levied or imposed upon the assessee in respect of the undisclosed income determined in the block assessment.

Authority competent to make the block assessment

158BG. The order of assessment for the block period shall be passed by an Assessing Officer not below the rank of an Assistant Commissioner:

Provided that no such order shall be passed without the previous approval of the Commissioner.

Application of other provisions of this Act

158BH. Save as otherwise provided in this Chapter, all other provisions of this Act shall apply to assessment made under this Chapter.'

Amendment of section 194A

33. In section 194A of the Income-tax Act, sub-section (3), with effect from the 1st day of July, 1995,-

(a) in clause (i), the following proviso shall be inserted at the end, namely:-

'Provided that in respect of the income credited or paid in respect of time deposits with a banking company to which the Banking Regulation Act, 1949 (10 to 1949), applies (including any bank or banking institution referred to in section 51 of that Act) or with a co-operative society engaged in carrying on the business of banking, the provisions of this clause shall have effect as if for the words "two thousand five hundred rupees", the words "ten thousand rupees" had been substituted and the aforesaid amount shall be computed with reference to the income credited or paid by a branch of the banking company or the co-operative society, as the case may be;,

(b) for clause (vii), the following clauses shall be substituted, namely :-

"*(vii)* to such income credited or paid in respect of deposits (other than time deposits made on or after the 1st day of July, 1995) with a banking company to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act);

(viia) to such income credited or paid in respect of,-

(a) deposits with a primary agricultural credit society or a primary credit society or a cooperative land mortgage bank or a co-operative land development bank;

(b) deposits (other than time deposits made on or after the 1st day of July, 1995) with a co-operative society, other than a co-operative society or bank referred to in sub-clause (a), engaged in carrying on the business of banking;"

(c) the following *Explanation* shall be inserted at the end, namely :-

Explanation.-For the purposes of clauses *(i)*, *(vii)* and *(viia)*, "time deposits" means deposits (excluding recurring deposits) repayable on the expiry of fixed periods.'

Amendment of section 194C

34. In section 194C of the Income-tax Act, with effect from the 1st day of July, 1995,-

(i) in sub-section (1),-

(a) in clause *(i)*, for the words and figures "University Grants Commission Act, 1956 (3 of 1956)", the words and figures "University Grants Commission Act, 1956 (3 of 1956) ; or" shall be substituted;

(b) after clause *(i)*, the following clause shall be inserted, namely;-

"*(j)* any firm,"

'(c) for the words "deduct an amount equal to two per cent of such sum as Income-tax on income comprised therein" the following shall be substituted namely :—

"deducted an amount equal to —

(i) one per cent in case of advertising,

(ii) in any other case two per cent of such sum as Income-tax on income comprised therein".

(ii) below sub-section (2), after *Explanation* II, the following *Explanation* shall be inserted namely :-

'*Explanation* III. -For the purposes of this section, the expression "work" shall also include-

(a) advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods and passengers by any mode of transport other than by railways;

(d) catering'

(iii) in sub-section (3), in clause (i), for the words "ten thousand rupees", the words "twenty thousand rupees" shall be substituted.

Amendment of section 194-I

35. In section 194-I of the Income-tax Act, in the opening portion, for the words "deduct income-tax thereon at the rate of twenty per cent", the following shall be substituted with effect from the 1st day of July, 1995, namely:-

"deduct income-tax thereon at the rate of-

(a) fifteen per cent if the payee is an individual or a Hindu undivided family; and

(b) twenty per cent in other cases".

Insertion of new sections 194J and 194K

36. After section 194-I of the Income-tax Act, the following sections shall be inserted with effect from the 1st day of July, 1995, namely:-

Fees for professional or technical services

'194J. *(1)* Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of-

(a) fees for professional services, or

(b) fees for technical services,

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to five per cent of such sum as income-tax on income comprised therein:

Provided that no deduction shall be made under this section-

(A) from any sums as aforesaid credited or paid before the 1st day of July, 1995; or

(B) where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed-

(i) twenty thousand rupees, in the case of fees for professional services referred to in clause *(a)*, or

(ii) twenty thousand rupees, in the case of fees for technical services referred to in clause *(b)*

(2) Where the Assessing Officer is satisfied that the total income of any person in receipt of the sum referred to in sub-section (1) justifies the deduction of income-tax at any lower rate or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by that person in this behalf, give to him such certificate as may be appropriate.

(3) Where any such certificate is given, the person responsible for paying the sum referred to in sub-section *(1)* shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.

Explanation.-For the purposes of this section,-

(a) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;

(b) "fees for technical services" shall have the same meaning as in *Explanation* 2 to clause *(vii)* of sub-section *(1)* of section 9;

(c) where any sum referred to in sub-section *(1)* is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly.

Income in respect of units.

194K. *(1)* Where any income is payable to a resident in respect of units of a Mutual Fund specified under clause *(23D)* of section 10 or of the Unit Trust

of India the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of,-

(a) twenty per cent, if the payee is a company, and

(b) fifteen per cent in the case of other payees.

(2) The provisions of sub-section *(1)* shall not apply-

(i) where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the person responsible for making the payment to the account of, or to, the payee does not exceed ten thousand rupees:

Provided that the amount of ten thousand rupees shall be computed with reference to the income credited or paid,-

(a) in respect of a branch office of the Mutual Fund or of the Unit Trust of India, as the case may be, and

(b) under a particular scheme under which the units have been issued;

(ii) to such income credited or paid before the 1st day of July, 1995;

(iii) to such income credited or paid in respect of units issued under such scheme already in operation of the Mutual Fund or of the Unit Trust of India, as the Central Government may, by notification in the Official Gazette, specify in this behalf having regard to the plan of payment of income thereunder to the unit-holders; and

(iv) to such income credited or paid in respect of units issued under any scheme of the Unit Trust of India to any institution or fund where such income is not liable to inclusion in its total income under the provisions of sections 11 and 12 or clause *(22)* or clause *(22A)* or clause *(23)* or clause *(23AA)* or clause *(23C)* of section 10.

Explanation.-For the purposes of this section,-

(a) "Unit Trust of India" means the Unit Trust of India Act, 1963 (52 of 1963);

(b) where any income as aforesaid is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly."

Substitution of new section for section 196A

37. For section 196A of the Income-tax Act, the following section shall be substituted with effect from the 1st day of July, 1995, namely:-

Income in respect of units of non-residents

'196A. *(1)* Any person responsible for paying to a non-resident, not being

a company, or to a foreign company, any income in respect of units of a Mutual Fund specified under clause (23D) of section 10 or of the Unit Trust of India shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of twenty per cent.

(2) Notwithstanding anything contained in sub-section *(1)*, no deduction of tax shall be made from any income payable in respect of units of the Unit Trust of India to a non-resident Indian or a non-resident Hindu undivided family, where the units have been acquired from the Unit Trust of India out of the funds in a Non-resident (External) Account maintained with any bank in India or by remittance of funds in foreign currency, in accordance, in either case, with the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and the rules made thereunder.

Explanation.-For the purposes of this section-

(a) "foreign currency" shall have the meaning assigned to it in the Foreign Exchange regulation Act, 1973 (46 of 1973);

(b) "non-resident Indian" shall have the meaning assigned to it in clause *(e)* of section 115C;

(c) "Unit Trust of India" means the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963);

(d) where any income as aforesaid is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.'

Amendment of section 197

38. In section 197 of the Income-tax Act, in sub-section *(1)*, after the figures and letter "194-I", the figures and letter ", 194K" shall be inserted with effect from the 1st day of July, 1995.

Amendment of section 197A

39. In section 197A of the Income-tax Act, for sub-section *(1A)*, the following sub-section shall be substituted with effect from the 1st day of July, 1995, namely:-

"*(1A)* Notwithstanding anything contained in section 194A or section 194K, no deduction of tax shall be made under either of the said sections in the case of a person (not being a company or a firm), if such person furnishes to the person responsible for paying any income of the nature referred to in section 194A or section 194K, as the case may be, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the tax on his estimated total income of the previous year in which such income is to be included in computing his total income will be *nil*."

Amendment of sections 198 to 200 and 202 to 205

40. In sections 198, 199, 200, 202, 203, 203A, 204 and 205 of the Income-tax Act, after the word, figures and letter "section 194-I," the words, figures and letters "section 194J, section 194K," shall be inserted with effect from the 1st day of July, 1995.

Amendment of section 230A

41. In section 230A of the Income-tax Act, in sub-section *(1)*, for the words "two lakh rupeess", the words "five lakh rupees" shall be substituted with effect from the 1st day of July, 1995.

Amendment of section 234B

42. In section 234B of the Income-tax Act,-

(i) in sub-section *(1)*, for the words "or regular assessment on an amount", the words "and where a regular assessment is made, to the date of such regular assessment, on an amount" shall be substituted and shall be deemed always to have been substituted with effect from the 1st day of April, 1989.

(ii) in sub-section *(3)*, for the words, brackets and figure "or regular assessment referred to in sub-section *(1)*, "the words, brackets and figure" and where a regular assessment is made as is referred to in sub-section *(1)* following the date of such regular assessment" shall be substituted and shall be deemed always to have been substituted with effect from the 1st day of April 1989.

Amendment of section 245C

43. In section 245C of the Income-tax Act, in sub-section *(1)*, in the proviso, in clause *(b)*, for the words "fifty thousand rupees", the words "one hundred thousand rupees" shall be substituted with effect from the 1st day of July, 1995.

Amendment of section 245D

44. In section 245D of the Income-tax Act, in sub-section *(1)*, for the second proviso, the following proviso shall be substituted with effect from the 1st day of July, 1995, namely :-

"Provided further that the Commissioner shall furnish the report within a period of forty-five days of the receipt of communication from the Settlement Commission in case of all applications made under section 245C on or after the 1st day of July, 1995 and if the Commissioner fails to furnish the report within the said period, the Settlement Commission may make the order without such report."

Amendment of section 253

45. In section 253 of the Income-tax Act, with effect from the 1st day of July, 1995,-

(i) in sub-section *(1)*, after clause *(a)*, the following clause shall be inserted, namely:-

"*(b)* an order passed by an Assessing Officer under clause *(c)* of section 158BC; or";

(ii) in sub-section *(3)*, the following proviso shall be inserted at the end, namely:-

'Provided that in respect of any appeal under clause *(b)* of sub-section *(1)*, this sub-section shall have effect as if for the words "sixty days", the words "thirty days" had been substituted.'

Amendment of section 269UC

46. In section 269UC of the Income-tax Act, with effect from the 1st day of July, 1995.-

(i) in sub-section *(1)*, for the words "no transfer of any immovable property of such value exceeding five lakh rupees as may be prescribed", the words "no transfer of any immovable property in such area and of such value exceeding five lakh rupees, as may be prescribed", shall be substituted;

(ii) after sub-section *(3)*, the following sub-section shall be inserted, namely :-

"*(4)* Where it is found that the statement referred to in sub-section *(2)* is defective, the appropriate authority may intimate the defect to the parties concerned and give them an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period which, on an application made in this behalf, the appropriate authority may, in its discretion, allow and if the defect is not rectified within the said period of fifteen days or, as the case may be, the further period so allowed, then, notwithstanding anything contained in any other provision of this Chapter, the statement shall be deemed never to have been furnished."

Amendment of section 269UD

47. In section 269UD of the Income-tax Act, with effect from the 1st day of July, 1995, in sub-section *(1)*, after the second proviso, the following proviso shall be inserted, namely : -

"Provided also that the period of limitation referred to in the second proviso shall be reckoned, where any defect as referred to in sub-section *(4)* of section 269UC has been intimated, with reference to the date of receipt of the rectified statement by the appropriate authority."

Amendment of section 271B

48. In section 271B of the Income-tax Act, for the words, figures, letters and brackets "obtain a report of such audit as required under section 44AB or furnish the said along with the return of his income filed under sub-section *(1)* of section 139, or along with the return of income furnished in response to a notice under clause *(i)* of sub-section *(1)* of section 142," the words, figures and letters "furnish a report of such audit as required under section 44AB" shall be substituted with effect from the 1st day of July, 1995.

Amendment of section 293A

49. In section 293A of the Income-tax Act,-

(a) in sub-section *(1)*, after the words "or in regard to the whole or any part of the income of such class of persons", the following words shall be inserted and shall be deemed always to have been inserted with effect from the 1st day of April, 1993, namely:-

"or in regard to the status in which such class of persons or the members thereof are to be assessed on their income from the business referred to in clause *(a)* of sub-section *(2)*:

Provided that the notification for modification in respect of the status may be given effect from an assessment year beginning on or after the 1st day of April, 1993";

(b) for *Explanation* occurring at the end, the following *Explanation* shall be substituted and shall be deemed always to have been substituted with effect from the 1st day of April, 1993, namely :-

'*Explanation* - For the purposes of this section,-

(a) "mineral oil" includes petroleum and natural gas;

(b) "status" means the category under which the assessee is assessed as "individual", "Hindu undivided family" and so on.'

THE FIRST SCHEDULE

(*See* Section 2)

PART I

INCOME-TAX

Paragraph A

Sub-Paragraph I

In the case of every individual or Hindu undivided family or association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (*vii*) of clause (*31*) of section 2 of the Income-tax Act, not being a case to which Sub-Paragraph II of this Paragraph or any other Paragraph of this Part applies,—

Rates of income-tax

(1) where the total income does not exceed Rs. 35,000	*Nil*;
(2) where the total income exceeds Rs. 35,000 but does not exceed Rs. 60,000	20 per cent of the amount by which the total income exceeds Rs. 35,000;
(3) where the total income exceeds Rs. 60,000 but does not exceed Rs. 1,20,000	Rs. 5,000 *plus* 30 per cent of the amount by which the total income exceeds Rs. 60,000;
(4) where the total income exceeds Rs. 1,20,000	Rs. 23,000 *plus* 40 per cent of the amount by which the total income exceeds Rs. 1,20,000.

Sub-Paragraph II

In the case of every Hindu undivided family which at any time during the previous year has at least one member whose total income of the previous year relevant to the assessment year commencing on the 1st day of April, 1995 exceeds Rs. 35,000,—

Rates of income-tax

(1) where the total income does not exceed Rs. 18,000	*Nil*;
(2) where the total income exceeds Rs. 18,000 but does not exceed Rs. 1,00,000	30 per cent of the amount by which the total income exceeds Rs. 18,000;
(3) where the total income exceeds Rs. 1,00,000	Rs. 24,600 *plus* 40 per cent of the amount by which the total income exceeds Rs. 1,00,000.

Paragraph B

In the case of every co-operative society,—

Rates of income-tax

(1) where the total income does not exceed Rs. 10,000	10 per cent of the total income;
(2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 20,000	Rs. 1,000 *plus* 20 per cent of the amount by which the total income exceeds Rs. 10,000;
(3) where the total income exceeds Rs. 20,000	Rs. 3,000 *plus* 35 per cent of the amount by which the total income exceeds Rs. 20,000.

Paragraph C

In the case of every firm,—

Rate of income-tax

On the whole of the total income 40 per cent.

Paragraph D

In the case of every local authority,—

Rate of income-tax

On the whole of the total income 30 per cent.

Paragraph E

In the case of a company,—

Rates of income-tax

I. In the case of a domestic company, 40 per cent of the total income;

II. In the case of a company other than a domestic company,—

(*i*) on so much of the total income as consists of—

(*a*) royalties received from Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 31st day of March, 1961 but before the 1st day of April, 1976, or

(*b*) fees for rendering technical services received from Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 29th day of February, 1964 but before the 1st day of April, 1976,

and where such agreement has, in either case, been approved by the Central Government 50 per cent;

(*ii*) on the balance, if any, of the total income — 55 per cent

Surcharge on income-tax

The amount of income-tax computed in accordance with the provisions of this Paragraph or section 112 shall, in the case of every domestic company having a total income exceeding seventy-five thousand rupees, be increased by a surcharge calculated at the rate of fifteen per cent of such income-tax.

PART II

RATES FOR DEDUCTION OF TAX AT SOURCE IN CERTAIN CASES

In every case in which under the provisions of sections 193, 194, 194A, 194B, 194BB, 194D and 195 of the Income-tax Act, tax is to be deducted at the rates in force, deduction shall be made from the income subject to deduction at the following rates :—

	Rate of income-tax
1. *In the case of a person other than a company*—	
(*a*) where the person is resident in India—	
(*i*) on income by way of interest other than "Interest on securities"	10 per cent;
(*ii*) on income by way of winnings from lotteries and crossword puzzles	40 per cent;
(*iii*) on income by way of winnings from horse races	40 per cent;
(*iv*) on income by way of insurance commission	10 per cent;
(*v*) on income by way of interest payable on—	10 per cent;
(*A*) any security of the Central or a State Government;	
(*B*) any debentures or other securities for money issued by or on behalf of any local authority or a corporation established by a Central, State or Provincial Act;	
(*C*) any debentures issued by a company where such debentures are listed on a recognised stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 and any rules made thereunder;	
(*vi*) on any other income	20 per cent;
(*b*) where the person is not resident in India—	
(*i*) in the case of a non-resident Indian—	
(*A*) on investment income and long-term capital gains	20 per cent;
(*B*) on income by way of dividends and interest payable by Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency	20 per cent;
(*C*) on income by way of winnings from lotteries and crossword puzzles	40 per cent;

	Rate of income-tax
(D) on income by way of winnings from horse races	40 per cent;
(E) on the whole of other income	income-tax at 30 per cent of the amount of income or income-tax in respect of the income at the rates prescribed in Sub-Paragraph I of Paragraph A of Part III of this Schedule, if such income had been the total income, whichever is higher;
(ii) in the case of any other person—	
(A) on income by way of dividends and interest payable by Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency	20 per cent;
(B) on income by way of winnings from lotteries and crossword puzzles	40 per cent;
(C) on income by way of winnings from horse races	40 per cent;
(D) on income by way of long-term capital gains	20 per cent;
(E) on the whole of other income	income-tax at 30 per cent of the amount of income or income-tax in respect of the income at the rates prescribed in Sub-Paragraph I of Paragraph A of Part III of this Schedule, if such income had been the total income, whichever is higher.

2. In the case of a company,—

(a) where the company is a domestic company—

(*i*) on income by way of interest other than "Interest on securities"	20 per cent;
(*ii*) on income by way of winnings from lotteries and crossword puzzles	40 per cent;
(*iii*) on income by way of winnings from horse races	40 per cent;
(*iv*) on any other income	21.5 per cent
(*b*) where the company is not a domestic company—	
(*i*) on income by way of dividends payable by any domestic company	20 per cent;
(*ii*) on income by way of winnings from lotteries and crossword puzzles	40 per cent;
(*iii*) on income by way of winnings from horse races	40 per cent;
(*iv*) on income by way of interest payable by Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency	20 per cent;
(*v*) on income by way of royalty payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 31st day of March, 1976, where such royalty is in consideration for the transfer of all or any rights (including the granting of a licence) in respect of copyright in any book on a subject referred to in the first proviso to sub-section (1A) of section 115A of the Income-tax Act, to the Indian concern, or in respect of any computer software referred to in the second proviso to sub-section (1A) of section 115A of the Income-tax Act, to a person resident in India	30 per cent;
(*vi*) on income by way of royalty [not being royalty of the nature referred to in sub-item (b) (v)] payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy—	
(*A*) where the agreement is made after the 31st day of March, 1961 but before the 1st day of April, 1976	50 per cent;

(*B*) where the agreement is made after the 31st day of March, 1976 — 30 per cent;

(*vii*) on income by way of fees for technical services payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy—

(*A*) where the agreement is made after the 29th day of February, 1964 but before the 1st day of April, 1976 — 50 per cent:

(*B*) where the agreement is made after the 31st day of March, 1976 — 30 per cent;

(*viii*) on income by way of long-term capital gains — 20 per cent;

(*ix*) on any other income — 55 per cent.

Explanation.—For the purpose of item 1 (*b*) (*i*) of this Part, "investment income" and "non-resident Indian" shall have the meanings assigned to them in Chapter XII-A of the Income-tax Act.

Surcharge on income-tax

The amount of income-tax deducted in accordance with the provisions of sub-item (*a*) of item 2 of this Part shall be increased by a surcharge, calculated at the rate of fifteen per cent of such income-tax.

PART III

RATES FOR CALCULATING OR CHARGING INCOME-TAX IN CERTAIN CASES, DEDUCTING INCOME-TAX FROM INCOME CHARGEABLE UNDER THE HEAD "SALARIES" AND COMPUTING "ADVANCE TAX"

In cases in which income-tax has to be calculated under the first proviso to sub-section (5) of section 132 of the Income-tax Act or charged under sub-section (4) of section 172 or sub-section (2) of section 174 or section 175 or sub-section (2) of section 176 of the said Act or deducted under section 192 of the said Act from income chargeable under the head "Salaries" or in which the "advance tax" payable under Chapter XVII-C of the said Act has to be computed at the rate or rates in force, such income-tax or, as the case may be, "advance tax" [not being "advance tax" in respect of any income chargeable to tax under Chapter XII or Chapter XII-A or sub-section (*1A*) of section 161

or section 164 or section 164A or section 167B of the Income-tax Act at the rates as specified in that Chapter or section or surcharge on such "advance tax" in respect of any income chargeable to tax under section 115B], shall be calculated, charged, deducted or computed at the following rate or rates:—

Paragraph A

Sub-Paragraph I

In the case of every individual or Hindu undivided family or association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (*vii*) of clause (*31*) of section 2 of the Income-tax Act, not being a case to which Sub-Paragraph II of this Paragraph or any other Paragraph of this Part applies,—

Rates of income-tax

(1) where the total income does not exceed Rs. 40,000	*Nil*;
(2) where the total income exceeds Rs. 40,000 but does not exceed Rs. 60,000	20 per cent of the amount by which the total income exceeds Rs. 40,000;
(3) where the total income exceeds Rs. 60,000 but does not exceed Rs. 1,20,000	Rs. 4,000 *plus* 30 per cent of the amount by which the total income exceeds Rs. 60,000;
(4) where the total income exceeds Rs. 1,20,000	Rs. 22,000 *plus* 40 per cent of the amount by which the total income exceeds Rs.1,20,000.

Sub-Paragraph II

In the case of every Hindu undivided family which at any time during the previous year has at least one member whose total income of the previous year relevant to the assessment year commencing on the 1st day of April, 1996 exceeds Rs. 40,000,—

Rates of income-tax

(1) where the total income does not exceed Rs. 18,000	*Nil*;
(2) where the total income exceeds Rs. 18,000 but does not exceed Rs. 1,00,000	30 per cent of the amount by which the total income exceeds Rs. 18,000;
(3) where the total income exceeds Rs. 1,00,000	Rs. 24,600 *plus* 40 per cent of the amount by which the total income exceeds Rs. 1,00,000.

Paragraph B

In the case of every co-operative society,—

Rates of income-tax

(1) where the total income does not exceed Rs. 10,000	10 per cent of the total income;
(2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 20,000	Rs. 1,000 *plus* 20 per cent of the amount by which the total income exceeds Rs. 10,000;
(3) where the total income exceeds Rs. 20,000	Rs. 3,000 *plus* 35 per cent of the amount by which the total income exceeds Rs. 20,000.

Paragraph C

In the case of every firm,—

Rate of income-tax

On the whole of the total income 40 per cent

Paragraph D

In the case of every local authority,—

Rate of income-tax

On the whole of the total income 30 per cent

Paragraph E

In the case of a company,—

Rates of income-tax

I. In the case of a domestic company 40 per cent of the total income;

II. In the case of a company other than a domestic company,—

(*i*) on so much of the total income as consists of—

(*a*) royalties received from Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 31st day of March, 1961 but before the 1st day of April, 1976, or

(*b*) fees for rendering technical services received from Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 29th day of February, 1964 but before the 1st day of April, 1976,

and where such agreement has, in either case, been approved by the Central Government	50 per cent
(*ii*) on the balance, if any, of the total income	55 per cent

Surcharge on income-tax

The amount of income-tax computed in accordance with the provisions of this Paragraph or sections 112 and 113 shall, in the case of every domestic company having a total income exceeding seventy-five thousand rupees, be increased by a surcharge calculated at the rate of fifteen per cent of such income-tax.

PART IV

[*See* Section 2(9)(*d*)]

RULES FOR COMPUTATION OF NET AGRICULTURAL INCOME

Rule 1.—Agricultural income of the nature referred to in sub-clause (*a*) of clause (*1A*) of section 2 of the Income-tax Act shall be computed as if it were income chargeable to income-tax under that Act under the head "Income from other sources" and the provisions of sections 57 to 59 of that Act shall, so far as may be, apply accordingly :

Provided that sub-section (*2*) of section 58 shall apply subject to the modification that the reference to section 40*A* therein shall be construed as not including a reference to sub-sections (*3*) and (*4*) of section 40A.

Rule 2.—Agricultural income of the nature referred to in sub-clause (*b*) or sub-clause (*c*) of clause (1*A*) of section 2 of the Income-tax Act [other than income derived from any building required as a dwelling house by the receiver of the rent or revenue or the cultivator or the receiver of rent-in-kind referred to in the said sub-clause (*c*)] shall be computed as if it were income chargeable to income-tax under that Act under the head "Profits and gains of business or profession" and the provisions of sections 30, 31, 32, 36, 37, 38, 40, 40A [other than sub-sections (*3*) and (*4*) thereof], 41, 43, 43A, 43B and 43C of the Income-tax Act shall, so far as may be, apply accordingly.

Rule 3.—Agricultural income of the nature referred to in sub-clause (*c*) of clause (1*A*) of section 2 of the Income-tax Act, being income derived from any building required as a dwelling house by the receiver of the rent or revenue or the cultivator or the receiver of rent-in-kind referred to in the said sub-clause (*c*) shall be computed as if it were income chargeable to income-tax under that Act under the head "Income from house property" and the provisions of sections 23 to 27 of that Act shall, so far as may be, apply accordingly.

Rule 4.—Notwithstanding anything contained in any other provisions of these rules, in a case where the assessee derives income from sale of tea grown and manufactured by him in India, such income shall be computed in accordance with rule 8 of the Income-tax Rules, 1962, and sixty per cent of such income shall be regarded as the agricultural income of the assessee.

Rule 5.—Where the assessee is a member of an association of persons

or a body of individuals (other than a Hindu undivided family, a company or a firm) which in the previous year has either no income chargeable to tax under the Income-tax Act or has total income not exceeding the maximum amount not chargeable to tax in the case of an association of persons or a body of individuals (other than a Hindu undivided family, a company or a firm) but has any agricultural income, then, the agricultural income or loss of the association or body shall be computed in accordance with these rules and the share of the assessee in the agricultural income or loss so computed shall be regarded as the agricultural income or loss of the assessee.

Rule 6.—Where the result of the computation for the previous year in respect of any source of agricultural income is a loss, such loss shall be set off against the income of the assessee, if any, for that previous year from any other source of agricultural income:

Provided that where the assessee is a member of an association of persons or a body of individuals and the share of the assessee in the agricultural income of the association or body, as the case may be, is a loss, such loss shall not be set off against any income of the assessee from any other source of agricultural income.

Rule 7.—Any sum payable by the assessee on account of any tax levied by the State Government on the agricultural income shall be deducted in computing the agricultural income.

Rule 8.—(*1*) Where the assessee has, in the previous year relevant to the assessment year commencing on the 1st day of April, 1995, any agricultural income and the net result of the computation of the agricultural income of the assessee for any one or more of the previous years relevant to the assessment years commencing on the 1st day of April, 1987 or the 1st day of April, 1988 or the 1st day of April, 1989 or the 1st day of April, 1990 or the 1st day of April, 1991 or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994, is a loss, then, for the purposes of sub-section (*2*) of section 2 of this Act,—

(*i*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1987, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1988 or the 1st day of April, 1989 or the 1st day of April, 1990 or the 1st day of April, 1991 or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994,

(*ii*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1988, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1989 or the 1st day of April, 1990 or the 1st day of April, 1991, or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994,

(*iii*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1989, to the extent,

if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1990 or the 1st day of April, 1991 or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994,

(*iv*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1990, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1991 or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994,

(*v*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1991, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994,

(*vi*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1992, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1993 or the 1st day of April, 1994,

(*vii*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1993, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1994,

(*viii*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1994,

shall be set off against the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1995.

(*2*) Where the assessee has, in the previous year relevant to the assessment year commencing on the 1st day of April, 1996 or, if by virtue of any provision of the Income-tax Act, income-tax is to be charged in respect of the income of a period other than that previous year, in such other period, any agricultural income and the net result of the computation of the agricultural income of the assessee for any one or more of the previous years relevant to the assessment years commencing on the 1st day of April, 1988 or the 1st day of April, 1989 or the 1st day of April, 1990 or the 1st day of April, 1991 or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994 or the 1st day of April, 1995, is a loss, then, for the purposes of sub-section (*8*) of section 2 of this Act,—

(*i*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1988, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1989 or the 1st day of April, 1990 or the 1st day of April,

1991 or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994 or the 1st day of April, 1995,

(*ii*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1989, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1990 or the 1st day of April, 1991 or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994 or the 1st day of April, 1995,

(*iii*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1990, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1991 or the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994 or the 1st day of April, 1995,

(*iv*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1991, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1992 or the 1st day of April, 1993 or the 1st day of April, 1994 or the 1st day of April, 1995,

(*v*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1992, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1993 or the 1st day of April, 1994 or the 1st day of April, 1995,

(*vi*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1993, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1994 or the 1st day of April, 1995,

(*vii*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1994, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1995,

(*viii*) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1995,

shall be set off against the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1996.

(*3*) Where any person deriving any agricultural income from any source has been succeeded in such capacity by another person, otherwise than by inheritance, nothing in sub-rule (*1*) or sub-rule (*2*) shall entitle any person, other than the person incurring the loss, to have it set off under sub-rule (*1*) or, as the case may be, sub-rule (*2*).

(4) Notwithstanding anything contained in this rule, no loss which has not been determined by the Assessing Officer under the provisions of these rules or the rules contained in Part IV of the First Schedule to the Finance Act, 1987 (11 of 1987), or of the First Schedule to the Finance Act, 1988 (26 of 1988), or of the First Schedule to the Finance Act, 1989 (13 of 1989), or of the First Schedule to the Finance Act, 1990 (12 of 1990), or of the First Schedule to the Finance (No. 2) Act, 1991 (49 of 1991), or of the First Schedule to the Finance Act, 1992 (18 of 1992), or of the First Schedule to the Finance Act, 1993 (38 of 1993), or of the First Schedule to the Finance Act, 1994 (32 of 1994) shall be set off under sub-rule (*1*) or, as the case may be, sub-rule (*2*).

Rule 9. — Where the net result of the computation made in accordance with these rules is a loss, the loss so computed shall be ignored and the net agricultural income shall be deemed to be *nil*.

Rule 10. — The provisions of the Income-tax Act relating to procedure for assessment (including the provisions of section 288A relating to rounding off of income) shall, with the necessary modifications, apply in relation to the computation of the net agricultural income of the assessee as they apply in relation to the assessment of the total income.

Rule 11.— For the purposes of computing the net agricultural income of the assessee, the Assessing Officer shall have the same powers as he has under the Income-tax Act for the purposes of assessment of the total income.

CIRCULARS / INCOME-TAX

Circular No. 702

Dated 3-4-1995

Sub : Clarification of the provisions of Section 80DD of the Income-tax Act, 1961

Under the provisions of Section 80DD of the Income-tax Act, 1961, an assessee who is resident in India being an individual or a Hindu Undivided Family is allowed a deduction of Rs. 15,000/- for expenditure incurred in respect of handicapped dependants subject to the following conditions :—

(i) the handicapped dependent is a relative of the assessee and is not dependant on any person other than the assessee for his support or maintenance;

(ii) he is suffering from a permanent physical disability (including blindness) or mental retardation and the same is certified by a Physician, Psychiatrist etc. working in Government hospital;

(iii) The disability has the effect of reducing considerably such person's capacity for normal work or engaging in a gainful employment or occupation;

(iv) the assessee has incurred any expenditure for medical treatment (including nursing), training and rehabilitation of the handicapped dependant.

(2) The Board has received several representations seeking clarification regarding the quantum of deduction available in relation to the expenditure incurred on the handicapped dependants.

(3) It is hereby clarified that the deduction under Section 80DD of the Income-tax Act, 1961 is statutory in nature. Therefore, as long as the conditions mentioned in the section are fulfilled, and the assessee had incurred any expenditure on medical treatment, etc. of the handicapped person, the deduction as envisaged in the section will be allowable in full.

Circular No. 703

Dated 18-4-1995

Sub : Set off of losses of firms for the assessment year 1993-94 — Interpretation of the new section 75 of the Income-tax Act, 1961

With effect from the assessment year 1993-94 a new procedure for taxation of firms has been introduced according to which the distinction between the registered and unregistered firms has been done away with. Consequently the requirement of apportionment of losses among the partners for set off and carry forward has also been given up. In line with this procedure, section 75 provides, with effect from 1st April, 1993, that if there are unabsorbed losses in the hands of the partners to whom such losses had been apportioned for the assessment year

1992-93 and earlier years, the same shall be brought back to the firm to be set off against the income of the firm subject to the condition that the partner continue to be a partner in the said firm and are to be carried forward for set off under section 70, 71, 72, 73 nd 74A.

2.Doubts have been expressed in some quarters as to whether the unabsorbed business losses so brought back to the firm are available for set off against the income of the firm under all heads for the assessment year 1993-94. This doubt has arisen because, normally, under section 72, the business losses brought forward are permitted to be set off only against the income under the head profits and gains of business or profession, and, that too, only if the business in respect of which the losses were incurred continues to be carried on in the year of set off.

3. A plain reading of section 75 shows that the losses which remain unabsorbed in the hands of the partners shall be allowed to be set of against the income of the firm subject to the condition that the partner continues in the said firm and to be carried forward for set off under sections 70, 71, 72, 73, 74 and 74A. The expressions "set off" and "carried forward and set off" have been used in conjunction with sections 70, 71, 72, etc., thereby implying that both set off and carry forward and set off as envisaged in these sections are permissible.

4..The Board has, therefore, decided that the set off envisaged under sections 70 and 71 may be allowed for the assessment year 1993-94 in the hands of the firm in respect of the unabsorbed losses brought back to the firm.

NOTIFICATIONS / INCOME TAX RULES

Income-tax (Third Amendment) Rules, 1995

Notification No. 9766 — *Dated 9-5-1995*

In exericse of the powes conferrd by section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962 namely :

1. (1) These rules may be called the Income-tax (Third Amendment) rules, 1995.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In rule 115 of the Income-tax rules, 1962, in sub-rule (1), in the *Explanation*, in clause (2), in the proviso after sub-clause (f), for the words "the date on which the tax has been so deducted", the following words and figures shall be substituted, namely :

> "the date on which the tax was required to be deducted under the provisions of the Chapter XVII-B."

[F.No. 149/215/93-TPL]

NOTIFICATION / INCOME TAX

Notification No. 9771 — *Dated 23-5-1995*

S.O. 460E — In exercise of the powers conferred by section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely : —

1. (1) These rules may be called the Income-tax (Fourth Amendment) Rules, 1995

(2) They shall come into force from the 1st of June, 1995.

2. In the Income-tax Rules, 1962, —

(i) in sub-rule (1) of rule 12 of the Income-tax Rules, 1962, in clause (b), after sub-clause (i) the following sub-clause shall be inserted, namely :—

"(ii) where, in the case of an individual or a Hindu Undivided Family, resident in India, the total income-

(A) does not exceed Rs. 1,20,000;

(B) does not include income chargeable to income-tax under the head "Profits and gains of business or profession"; and

(C) does not include any brought forward or carried forward loss or allowance except under the head "Income from house property" be in Form No. 2A and be verified in the manner indicated therein;

Provided that the assessee to whom this sub-clause applies shall also have the option of filing the return in Form No.3".

(ii) in Appendix II, for the Form No. 2A, the following Form shall be subsituted, namely :—

FORM NO. 2A

INCOME-TAX RETURN

This form may be used only by individuals and Hindu undivided families who are residents in India and fulfil all the following conditions : (a) There is no income from business or profession. (b) There is no brought forward or carried forward loss/allowance under any head except from house property. (c) The total income does not exceed Rs. 1,20,000. Three copies of this form are to be filed. One of these will be returned to you duly acknowledged.	*To be filled by the receiving official of the Department :* Acknowledgment / RETURN / For Computer Centre Receipt No.________ Date ________ ________________ Signature of the Receiving Official Name ________________ Designation ________________ Assessing Officer Code________ Stamp

PART I — General Information

1. Assessment Year 19 ☐☐-☐☐ 2. PAN/GIR No. ☐☐☐☐☐☐☐☐☐☐☐☐

3. Ward/Circle/Special Range ☐☐☐☐☐☐ 4. Date of birth ☐☐☐☐☐☐ 5. Status ☐☐

6. If revised return, receipt no. & date of filing the original ☐ 7. Sex (male-M, female-F)

8. Name (Last name, first name & middle name) ☐☐☐☐☐☐☐☐☐☐☐

9. Office Address ☐☐☐☐☐☐☐☐☐☐☐

PIN☐☐☐☐☐☐ Telephone☐☐☐☐☐☐

10. Residential Address ☐☐☐☐☐☐☐☐☐☐☐

PIN☐☐☐☐☐☐ Telephone☐☐☐☐☐☐

11. Father's Name (Last name, first name & middle name) ☐☐☐☐☐☐☐☐☐☐☐

PART II - Statement of Income

	Heads of income		Code	Amount (Rs.)
12. SALARIES	Income under the head "Salaries" (Enclose form No. 16 from employer)		110	☐☐☐☐☐
13. HOUSE PROPERTY	a. Annual Value	☐☐☐☐☐☐☐	031	
	b. Less; Deductions u/s 24 and brought forward loss	☐☐☐☐☐☐☐	032	
	c. Income from house property (a-b)	☐☐☐☐☐☐☐	130	

14. CAPITAL GAINS	a. Short term capital gains	151	
	b. Long term capital gains	152	
	c. Income from capital gains (a+b)		150
15. OTHER SOURCES	a. Gross Income	061	
	b. Less Deductions	062	
	c. Income from other sources (a-b)		160

16. GROSS TOTAL INCOME (12+13.c+14.c+15.c) 101

17. a Name of the person, if any, whose income has been included in terms of Chapter V in the computation

17.b Income included in items 12 to16

18. LESS DEDUCTIONS UNDER CHAPTER VI-A

Section	Code	Deduction	Section	Code	Deduction	Section	Code	Deduction
80D	236		80DD	237		80G	242	
80GG	243		80GGA	248		80L	260	
80R	277		80RRA	281		80U	283	
80V	294		Total admissible deductions				200	

19. TOTAL INCOME (16-18)

Total income rounded off to the nearest multiple of ten rupees :

In figures 102

In words (Rs.)

20. NET AGRICULTURAL INCOME FOR RATE PURPOSES 105

PART III - Statement of Taxes

21. TAX ON TOTAL INCOME

a. Tax on Income subject to special rates :

Section	Income	Rate	Tax

Total 190 390

b. Tax on Income subject to normal rates of tax

Income Tax

c. Tax on total income (a+b) 310

26. NET TAX PAYABLE (24-25) 380

27. ADVANCE TAX PAID 350 (Attach challans)

28. TAX DEDUCTED/ COLLECTED AT SOURCE (Attach tax deduction/collection certificate) 391

29. BALANCE PAYABLE (26-27-28) 392

22. REBATE U/S 88	601 ☐☐☐☐☐	30. Interest payable u/s 234A/234B/234C	311 ☐☐☐☐☐
23. REBATE U/S 88B	605 ☐☐☐☐☐	31. TOTAL (29+30)	393 ☐☐☐☐☐
24. TAX PAYABLE (21-22-23)	310 ☐☐☐☐☐	32. SELF-ASSESSMENT TAX PAID (Attach challan)	333 ☐☐☐☐☐
25. RELIEF U/S 89/90/91	610 ☐☐☐☐☐	33. TAX / INTEREST PAYABLE OR REFUND DUE	360 ☐☐☐☐☐

PART IV - Income claimed exempt (Give details)	PART V - Documents attached

VERIFICATION

I ☐ (Name in full and block letters), son/daughter of ☐ solemnly declare that, to the best of my knowledge knowledge and belief, the information given in this return and the annexures and statements accompanying it is correct, complete and truly stated and in accordance with the provisions of Income-tax Act, 1961, in respect of income chargeable to income-tax for the previous year relevant to the assessment year, 1995-96.

Date ☐☐☐☐☐ ☐☐☐☐☐ Signature

Place ☐☐☐☐☐ ☐☐☐☐☐

[F.No. 142/19/95-TPL]

STATUTE

NOTIFICATION / INCOME-TAX

Notification No. 9752 — *Dated 21-4-1995* — Notification u/s. 90 of the IT Act, 1961 — Double Taxation Avoidance Agreement between Govt. of the Republic of India and the Government of the Swiss Confederation

Whereas the annexed Agreement between the Government of the Republic of India and the Government of the Swiss Confederation for the avoidance of double taxation with respect to taxes on income has entered into force on 29th December, 1994 after the notification by both the Contracting States to each other of the completion of the procedures required under their laws for bringing into force of the said Agreement in accordance with paragraph 1 of Article 26 of the Agreement;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act,1961 (43 of 1961) the Central Government hereby directs that all the provisions of the said Agreement shall be given effect to in the Union of India.

ANNEXURE

AGREEMENT BETWEEN THE REPUBLIC OF INDIA

AND

THE SWISS CONFEDERATION

FOR THE

AVOIDANCE OF DOUBLE TAXATION

WITH RESPECT TO TAXES ON INCOME

The Government of the Republic of India and the Swiss Federal Council desiring to conclude an agreement for the avoidance of double taxation with respect to taxes on income have agreed as follows :

Article 1

Personal scope

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

Article 2

Taxes covered

1. The taxes to which this Agreement shall apply are:

(a) In the case of India :

the income-tax including any surcharge thereon; and

(b) In the case of Switzerland:

the federal, cantonal and communal taxes on income (total income, earned income, income from capital, industrial and commercial profits, capital gains, and other items of income).

2. The Agreement shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1 of this Article.

3. In this Agreement, the term "Indian tax" means tax imposed by India, being tax to which this Agreement applies; the term "Swiss tax' means tax imposed in Switzerland, being tax to which this Agreement applies; and the term "tax' means Indian tax or Swiss tax, as the context requires; but the taxes in the preceding paragraphs of this Article do not include any penalty or interest imposed under the law in force in either Contracting State relating to the taxes to which this Agreement applies.

4. The competent authorities of the Contracting State shall notify to each other any significant changes which have been made in their relevant respective taxation laws.

Article 3

General Definitions

1. In this Agreement, unless the context otherwise requires:

(a) the term "India" means the territory of India and includes the territorial sea and the air space above it, as well as any other maritime zone in which India has sovereign rights, other rights and jurisdictions, according to the Indian law and in accordance with international law;

(b) the term "Switzerland' means the Swiss Confederation;

(c) the terms "a Contracting State' and "the other Contracting State" mean India or Switzerland, as the context requires;

(d) the term "persons" includes an individual, a company, a body of person, or any other entity which is taxable under the laws in force in either Contracting State;

(e) the term "company" means any body corporate or any entity which is treated as a company under the taxation laws of the respective Contracting States;

(f) the terms "enterprise of a Contracting State' and "enterprise of the other Contracting State" mean, respectively, an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

(g) the term "competent authority" means, in the case of India, the Central Government in the Department of Revenue or their

authorised representative, and, in the case of Switzerland, the Director of the Federal Tax Administration or his authorised representative;

(h) the term "national" means any individual possessing the nationality of a Contracting State and any legal person, partnership or association deriving its status from the laws in force in the Contracting State;

(i) the term "international traffic' means any transport by an aircraft operated by an enterprise of a Contracting State, except when the aircraft is operated solely between places in the other Contracting State;

(j) the term "operation of aircraft" shall mean business of transportation by air of passengers, mail, livestock or goods carried on by the owners or lessees or charters of aircraft, including the sale of tickets for such transportation on behalf of other enterprises, the incidental lease of aircraft and any other activity directly connected with such transportation;

(k) the term "fiscal year' means:

(i) in the case of India, the 'previous year' as defined in the Income-tax Act of India; and

(ii) in the case of Switzerland, the calendar year.

2. In the application of the provisions of this Agreement by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the laws in force in that State relating to the taxes which are the subject of this Agreement.

Article 4

Fiscal Domicile

1. For the purposes of this Agreement, the term "resident of a Contracting State' means any person who, under the laws of that State, is liable to taxationt herein by reason of his domicle, residence, place of incorporation, place of management or any other criterion of a similar nature.

2. Where by reason of the provisions of paragraph 1, and individual is a resident of both Contracting States, then his residential status for the purposes of this Agreement shall be determined in accordance with the following rules :

(a) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home avilable to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (hereinafter referred to as his "centre of vital interests");

(b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;

(c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;

(d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.

Article 5

Permanent Establishment

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment' shall include especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a store or other sales outlet;

(e) a factory;

(f) a workshop;

(g) a warehouse in relation to a person providing storage facilities for others;

(h) a permanent sales exhibition;

(i) a mine, a quarry, an oil or gas well, or any other place of extraction of natural resources;

(j) a building site or construction, installtion or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continue for a period of more than six months;

(k) an installation or structure used for the exploration or development of natural resources for more than 90 days; and

(l) the furnishing of services other than included services as defined in Article 12, within a Contracting State by an enterprise through employees or other personnel, but only if :

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period; or

(ii) the services are performed within that State for a related enterprise (within the meaning of paragraph 1 of Article 9) for a period or periods aggregating more than 30 days within any twelve-months period.

3. The term "permanent establishment" shall not be deemed to include:

(a) the use of facilities solely for the purposes of storage or display of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or for collecting information,for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information or for scientific research, being activities solely of a preparatory or auxiliary character in the trade or business of the enterprise.

4. A person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State-other than an agent of an independent status to whom paragraph 5 applies-shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if:

(i) he has and habitually exercises in that State, an authority to negotiate and enter into contracts for or on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the eneterprise; or

(ii) he habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise for or on behalf of the enterprise; or

(iii) in so acting, he manufactures or processes in that State for the enterprise goods or merchandise belonging to the enterprise, provided that this provision shall apply only in relation to the goods or merchandise so manufactured or processed.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it, he would not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company, which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other contracting State, or which carried on business in that other Contracting State (whether through a permanent establishment or otherwise, shall not, of itself, constitute for either company a permanent establishment of the other.

Article 6

Income from Immovable Property

1. Income from immovable property may be taxed in the Contracting State in which such property is situated.

2. The term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, oil wells, quarries and other places of extraction of natural resources. Ships and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of professional services.

Article 7

Business Profits

1. The business profits of an enterprise of a Contracting State, other than the profits from the operation of ships in international traffic, shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributed to that permanent establishment.

2. Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, whether in the State in which the permanent establishment is situated or elsewhere. Executive and general administrative expenses shall be allowed as deductions in accordance with the taxation laws of that State. Nothing in this paragraph shall, however, authorise a deduction for expenses which would not be deductible if the permanent establishment were a separate enterprise.

4. In so far as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various arts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles laid down in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by the permanent establishment of goods or merchandise for the enterprise.

6. Where profits include items of income which are dealt with separately in other Article of this Agreement, then the provisions of those Article shall not be affected by the provisions of this Article.

Article 8

Air Transport

1. Profits from the operation of aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

Article 9

Associated Enterprises

Where

(a) an enterprise of a Contracting State participates directly or indirectly

in the management, control or capital of an enterprise of the other Contracting State, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprise, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Article 10

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance' rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the taxation law of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such a case the provisions of Article 7 shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are said is effectively connected

with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 11

Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 15 per cent of the gross amount of interest.

3. Notwithstanding the provisions of paragraph 2, where the interest is paid to a bank carrying on a *bona fide* banking business or to an enterprise which holds directly or indirectly at least 20 per cent of the capital of the company paying the interest which are a resident of the other Contracting State and are the beneficial owner of the interest, the tax so charged in the Contracting State in which the interest arises shall not exceed 10 per cent of the gross amount of the interest.

4. Notwithstanding the provisions of paragraphs 2 and 3,

(a) interest arising in Switzerland and paid to a resident of India shall be taxable only in India if it is paid in respect of a loan made, guaranteed or insured, or a credit extended, guaranteed or insured by the Export-Import Bank of India or by any institution specified and agreed in letters exchanged between the competent authorities of the Contracting States.

(b) interest arising in India and paid to a resident of Switzerland shall be taxable only in Switzerland if it is paid in respect of a loan made, guaranteed or insured, or a credit extended, guranteed or insured under the Swiss provision regulating in Export or Investment Risk Gaurantee or by any institution specified and agreed in letters exchanged between the competent authorities of the Contracting States;

(c) interest arising in a Contracting State and paid to a resident of the other Contracting State engaged in the operation of aircraft in international traffic shall be taxable only in that other State to the extent that such interest is paid on funds connected with such activity;

(d) interest arising in India and paid to a resident of Switzerland shall be exempt from Indian tax if the loan or other indebtedness in respect of which the interest is paid in any approved loan. The term "approved loan" means any loan or other indebtedness approved by the Government of India in this behalf.

5. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such a case the provisions of Article 7 shall apply.

7. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

8. Where, owing to a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

Article 12

Royalties and Fees for Included Services

1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services referred to in sub-paragraph (b) of paragraph 4 of this Article :

(i) during the first five taxable years for which this Agreement has effect,

(A) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company; and

(B) 20 per cent of the gross amount of the roaylties or fees for included services in all other cases; and

(ii) during the subsequent years, 15 per cent of the gross amount of royalities or fees for inculded services; and

(b) in the case of royalties referred to in sub-paragraph (b) of paragraph 3 and fees for included services referred to in sub-paragraph (a) of paragraph 4 of this Article, 10 per cent of the gross amount of such royalties or fees for included services.

3. The term "royalties" as used in this Article means:

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematogrph films or work on film, tape or other means of reproduction for use in connection, with radio or television broadcasting, any patent trademark, design or model, plan, secret formula or process, or for information concerning industrial commercial or scientific experience ; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment.

4. For purposes of this Article the term "fees for included services" means:

(a) payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services are ancillary and subsidiary to the application or enjoyment of the right, for which a payment described in sub-paragraph (b) of paragraph 3 is received;

(b) payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(i) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in sub-paragraph (a) of paragraph 3 is received; or

(ii) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property;

(b) for teaching in or by educational institutions;

(c) for services for the personal use of the individual or individuals making the payment; or

(d) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services falling under Article 14.

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for included services arise, through a permanent establishment situated therein and the contract in respect of which the royalties or fees for included services are paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.

7. Royalties and fees included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for included services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the liability to pay the royalties or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment, then such royalties or fees for included services shall be deemed to arise in the State in which the permanent establishment is situated.

8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for included services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

Article 13

Capital gains

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with whole enterprise), may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic, or movable property pertaining to the operation of such ships or aircrafts, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains from the alienation of shares of a company, the property of which consists principally of movable property situated in a Contracting State, may be taxed in that State.

5. (a) Gains from the alienation of shares in a company which is a resident of a Contracting State shall be taxable only in the Contracting State of which the alienator is a resident.

(b) Notwithstanding the provision of sub-paragraph (a), India may tax gains from the alienation of shares in a company which is a resident of India.

(i) if the shares form part of at least a 10 per cent interest in the capital stock of that company, or

(ii) in other cases if the alienation takes place to a resident of that State.

In these cases the provisions of paragraph 1, sub-paragraph (b) of Article 21 shall apply.

6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5, shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14

Personal Services

1. Subject to the provisions of Articles 15, 17, 18, 19 and 20, salaries, wages and other similar remuneration in respect of all employment as well as income in respect of professional services or other activities of an independent character, derived by an individual resident of a Contracting State, shall be taxable only in that State, unless the employment, services or activities are exercised or performed in the other Contracting State. If the employment, services or activities are so exercised or performed, such remuneration or income as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration or income derived by a resident of a Contracting State in respect of an employment,

services or activities exercised or performed in the other Contracting S
shall be taxable only in the first-mentioned State if:

(a) the recipient is present in the other State for a period or peri not exceeding in the aggregate 183 days in the fiscal year,

(b) the remuneration or income is paid by, or on behalf of, a pe who is not a resident of the other State, and

(c) the remuneration or income is not borne by a permanent es lishment which that person has in the other State.

3. Notwithstanding the preceding provisions of this Article, remunera derived in respect of an employment exercised abroad a ship or air operated in international traffic shall be taxable only in the Contrac State in which the place of effective management of the enterprise is situa

Article 15

Directors' Fees

Directors' fees and similar payments derived by resident of a Contrac State in his capacity as a member of the Board of Directors of a comp which is a resident of the other Contracting State shall be taxable on that other Contracting State.

Article 16

Artistes and Athletes

1. Notwithstanding the provisions of Articles 7 and 14, income der by entertainers (such as stage, motion picture, radio or television arti and musicians) or athletes, from their personal activities as such sha taxable only in the Contracting State in which these activities are exerc

2. Where income as a result of personal activities as such exercised Contracting State by an entertainer or athlete accrues not to that enterta or athlete himself but to another person, that income may, notwithstan the provisions of Articles 7 and 14, be taxed in that Contracting S

3. The provisions of paragraphs 1 and 2 shall not apply if the visit Contracting State of the entertainer or the athlete is directly or indir supported, wholly or substantially, from the public funds of the c Contracting State, including any political sub-division, local authorit statutory body of that other State.

Article 17

Pension and Annuities

1. Any pension (other than a pension referred to in Article 18) or ann derived by a resident of a Contracting State shall be taxable only in State.

2. The term "pension" means a periodic payment made in considera

of past employment or by way of compensation for injuries received in the course of the performance of services.

3. The term "annuity" means a stated sum payable periodically at stated times, during life or during a specific or ascertainable period of time, under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

Article 18

Government Remuneration and Pensions

1. Remuneration, other than a pension, paid by the Government of a Contracting State to any individual who is a citizen of that State in respect of services rendered in the discharge of governmental functions in the other Contracting State shall be taxable only in the first-mentioned State.

2. Any pension paid by the Government of a Contracting State to any individual in respect of services rendered shall be taxable only in that Contracting State.

3. The provisions of paragraphs 1 and 2 of this Article shall not apply to payments in respect of services rendered in connection with any business carried on by the Government of either of the Contracting States for the purpose of profit.

4. For the purposes of this Article, the term "Government" shall include any State Government, canton or local or statutory authority of either Contracting State and in particular the Reserve Bank of India and the Swiss National Bank.

Article 19

Students and Apprentices

1. Payments which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that State, provided that such payments arise from sources outside that State.

2. In respect of grants, scholarships and remuneration from employment not covered by paragraph 1, a student or business apprentice described in paragraph 1 shall, in addition, be entitled during such education or training to the same exemptions, reliefs or reductions in respect of taxes available to residents of the State which he is visiting.

Article 20

Professors, Teachers and Researchers

1. An individual who is or was a resident of a Contracting State and who visits the other Contracting State for a period not exceeding 24 months

for the primary purpose of teaching or engaging in research, or both, at a university or other recognised educational institution shall be exempt from tax in that other Contracting State on his income from personal services for teaching or reserach at the university or the recognised educational institution.

2. This Article shall not apply to income from research if such research is undertaken primarily for the private benefit of specific person or persons.

Article 21

Elimination of Double Taxation

1. (a) Subject to any provisions of the law of India which may from time to time be in force and which relates to the relief of taxes paid in a country outside India, where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Switzerland, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in Switzerland whether directly or by deduction. Such deduction shall not, however, exceed part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in Switzerland.

(b) Where a resident of Switzerland derives gains from the alienation of shares which may be taxed in India according to Article 13, paragraph 5, sub-paragraph (b), India shall allow as a deduction from tax on that income, an amount equal to the income-tax paid in Switzerland on these capital gains. The deduction shall not, however, exceed that part of the Indian income-tax, which is imposed on these capital gains.

2. (a) Where a resident of Switzerland derives income which, in accordance with the provisions of this Agreement may be taxed in India, Switzerland shall, subject to the provisions of sub-paragraphs (b), (c) and (d), exempt such income from tax but may, in calculating tax on the remaining income of that resident, apply the rate of tax which would have been applicable if the exempted income had not been so exempted; provided, however,that such exemption shall apply to gains referred to in paragraph 4 of Article 13 only if actual taxation of such gains in India is demonstrated.

(b) Where a resident of Switzerland derives dividends, interest, royalties or fees for included services which, in accordance with the provisions of Articles 10, 11 and 12, may be taxed in India, Switzerland shall allow, upon request a relief to such resident. The relief may consist of—

(i) a credit from the Swiss tax on the income of that resident of an amount equal to the tax levied in India in accordance with

the provisions of Articles 10, 11 and 12; such credit shall not, however, exceed that part of the Swiss tax, as computed before the credit is given, which is appropriate to the income which may be taxed in India; or

(ii) a lump sum reduction of the Swiss tax; or

(iii) a partial exemption of such dividends, interest, royalties or fees for included services from Swiss tax, in any case consisting at least of the deduction of the tax levied in India from the gross amount of the dividends, interest, royalties or fees for included services.

Switzerland shall determine the applicable relief and regulate the procedure in accordance with the Swiss provisions relating to the carrying out of international conventions of the Swiss Confederation for the avoidance of double taxation.

(c) Notwithstanding the provisions of sub-paragraph (b), where a resident of Switzerland derives interest, royalties or fees for included services, which, in accordance with Articles 11, paragraph 2 and 12, paragraph 2, sub-paragraph (a) may be taxed in India, Switzerland shall allow, upon request, a relief to such resident which may consist of —

(i) A. a deduction of 5 per cent of the gross amount of such interest referred to in Article 11, paragraph 2;

B. during the first five calendar years for which this Agreement has effect,

(1) for royalties and fees for included services referred to in Article 12, paragraph 2, sub-paragraph (a)(i)(A):

(aa) a deduction of 5 per cent of the gross amount, of royalties or of fees for included services covered by Article 12, paragraph 4, sub-paragraph (b)(i);

(bb) a deduction of 10 per cent of the gross amount of fees for included services covered by Article 12, paragraph 4, sub-paragraph (b)(ii);

(2) for royalties and fees for included services referred to in Article 12, paragraph 2, sub-paragraph (a)(i)(B):

(aa) a deduction of 10 per cent of the gross amount of royalties or of fees for included services covered by Article 12, paragraph 4 sub-paragraph (b)(i);

(bb) a deduction of 15 per cent of the gross amount of fees for included services covered by Article 12, paragraph 4, sub-paragraph (b)(ii);

C. during the subsequent years for which this Agreement has effect:

(aa) a deduction of 5 per cent of the gross amount of royalties referred to in Article 12, paragraph 2, sub-paragraph (a)(ii) or of fees for included services covered by Article 12, paragraph 4, sub-paragraph (b)(i);

(bb) a deduction of 10 per cent of the gross amount of fees for included services covered by Article 12, paragraph 4, sub-paragraph (b)(ii);

(ii) a credit from the Swiss tax on the income of that resident, as computed by reference to the relief referred to in the foregoing sub-paragraph of an amount of— 10 per cent of the gross amount of the interest referred to in Article 11, paragraphs.

B. 10 per cent of the gross amount of the fees for included services covered by Article 12, paragraph 2, sub-paragraph (a), and of the fees for included services covered by Article 12, paragraph 4, sub-paragraph (b)(i);

C. 5 per cent of the gross amount of the fees for included services covered by Article 12, paragraph 4 sub-paragraph (b)(ii).

Such credit shall, however, be determined pursuant to the general principles of the relief referred to in sub-paragraph (b) of this paragraph.

(d) Where a resident of Switzerland derives interest dealt with in section 10(4) and 10(15)(iv)(c) of the Indian Income-tax Act of 1961 and referred to in Article 11, paragraph 4, sub-paragraph (d), Switzerland shall allow, upon request, a relief to such resident of an amount equal to 10 per cent of the gross amount of the interest.

Article 22

Non-discrimination

1. The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances and under the same conditions are or may be subjected.

2. Nothing contained in this Article shall be construed as obliging a Contracting State to grant to persons not residents in that State any personal allowances, reliefs and reductions for taxation purposes which are by law available only to persons who are so resident.

3. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State

are or may be subjected in the same circumstances and under the same conditions.

4. In this Article, the term "taxation" means taxes which are the subject of this Agreement.

Article 23

Mutual Agreement Procedure

1. Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, notwithstanding the remedies provided by the national laws of the those States, present his case to the competent authority of the Contracting State of which he is a resident. The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the Agreement.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the agreement.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation of application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.

4. The competent authorities of the Contracting States shall settle the limitations provided for in Articles 10, 11 and 12.

5. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States.

Article 24

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information (being information which is at their disposal under their respective taxation laws in the normal course of administration) as is necessary for carrying out the provisions of this Agreement in relation to the taxes which are the subject of this Agreement. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those concerned with the assessment and collection of the taxes which are the subject of this Agreement. No information as aforesaid shall be exchanged

which would disclose any trade, business, industrial or professional secret or trade process.

2. In no case shall be provisions of this Article be construed as imposing upon either of the Contracting States the obligation to carry our administrative measures at variance with the regulations and practice of either Contracting State or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application.

Article 25

Diplomatic and Consular Officials

Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special agreements.

Article 26

Entry into force

1. This Agreement shall come into force when the Contracting States have notified each other through diplomatic channels that all legal requirements and procedure for giving effect to this Agreement have been satisfied.

2. This Agreement shall enter into force upon the date of such notification and its provisions shall have effect :

(a) in India, in respect of income arising in any fiscal year beginning on or after the first day of April next following the calendar year in which the Agreement enter into force; and

(b) in Switzerland, in respect of income arising in any fiscal year beginning on or after the first day of January next following the calendar year in which the Agreement enters into force.

3. The Agreement between the Government of India and the Swiss Federal Council concerning the taxation of enterprises operating aircraft signed at New Delhi on 28th August, 1958 (in this Article called "the 1958 Agreement") shall cease to have effect with respect to taxes to which the Agreement applies when the provisions of this Agreement become effective in accordance with paragraph 2.

4. The 1958 Agreement shall terminate on the expiration of the last date on which it has effect in accordance with the foregoing provisions of this Article.

Article 27

Termination

This Agreement shall continue in effect indefinitely but either of the Contracting States may, on or before the thirtieth day of June in any calendar year,

give notice of termination to the other Contracting State and, in such event this Agreement shall cease to be effective :

(a) in India, in respect of income arising in any fiscal year beginning on or after the first day of April next following the calendar year in which the notice of termination is given; and

(b) in Switzerland, in respect of income arising in any fiscal year beginning on or after the first day of January next following the calendar year in which the notice of termination is given.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Agreement.

Done in duplicate at New Delhi this 2nd day of November, one thousand nine hundred and ninety four in Hindi, German, and English languages, all the texts being equally authentic, except in the case of doubt when the English text shall prevail.

For the Government of the Republic of India :	For the Swiss Federal Council:
Sd./-	Sd./-
(T.S. SRINIVASAN)	(JEAN-PIERRE ZEHNDER)
Chairman, Central Board of Direct Taxes, Ministry of Finance	Ambassador of Switzerland in India

PROTOCOL

to the Agreement between the republic of India and the Swiss confederation' for the avoidance of double taxation with respect to taxes on income.

At the signing of the Agreement concluded today between the Government of the Republic of India and the Swiss Federal Council for the avoidance of double taxation with respect to taxes on income, the undersigned have agreed upon the following additional provisions which shall form an integral part of the said Agreement.

1. With reference to Article 5

It is understood that the remuneration for furnishing of services covered by the sub-paragraph (1) of paragraph 2 shall be taxed according to Article 7 or, on request of the enterprise, according to the rates provided for in paragraph 2, sub-paragraph (a) of Article 12.

With respect to paragraph 3 of Article 5 it is understood that the maintenance of a stock of goods or merchandise for the purpose of delivery, or facilities used for delivery of goods and merchandise do not constitute a permanent establishment as long as the conditions of paragraphs 2 or 4 of the same Article are not fulfilled.

With respect to paragraph 4 of Article 5 it is understood that [illegible]

who habitually secures orders in a Contracting State wholly or almost wholly for the enterprise itself, shall be deemed to be a permanent establishment of that enterprise only if such person habitually represents to persons offering to buy goods or merchandise that acceptance of and order by such person constitutes the agreement of the enterprise to supply goods or merchandise under the terms and conditions specified in the order.

2. *With reference to Article 7*

With respect to paragraph 1 of Article 7 it is understood that the words "directly or indirectly" mean, for the purposes of this Article, that where a permanent establishment takes an active part in negotiating, concluding or fulfilling contracts entered into by the enterprise, then, notwithstanding that other parts of the enterprise have also participated in those transactions, there shall be attributed to the permanent establishment that proportion of profits of the enterprise arising out of those contracts as the contribution of the permanent establishment to those transactions bears to that the enterprise as a whole. It is also understood that profits shall be regarded as attributable to the permanent establishment to the above mentioned extent, even when the contracts in question are made directly with the head office of the enterprise rather than with the permanent establishment.

In the case of contracts for the survey, supply, installation or construction of industrial, commercial or scientific equipment or premises, or of public works, which are carried out by an enterprise having a permanent establishment, in a Contracting State the business profits of such permanent establishment shall not be determined on the basis of the total amount of the contract, but shall be determined only on the basis of that part of the contract which is effectively carried out by the permanent establishment in the State where the permanent establishment is situated; the profits related to that part of the contract which is carried out outside that Contracting State by the head office of the enterprise shall be taxable only in the State of which the enterprise is a resident , provided that the amount payable is not covered under the provisions of Article 12.

3. *With reference* to Articles 10,11 and 12

If after the signature of this Agreement under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interest, royalties or fees for included services to a rate lower or a scope more restricted than the rate or scope provided for in this Agreement on the said items of income, then, Switzerland and India shall enter into negotiations without undue delay in order to provide the same treatment to Switzerland as that provided to the third State.

4. *With reference to Article 12*

It is understood that gains derived from the alienation of a right or a property

mentioned in a paragraph 3 of Article 12 may be taxed according to Article 7 or Article 13. However, gains derived from the alienation of any such right or property which are contingent on the profits, productivity or use thereof may be taxed according to Article 12.

5. *With reference to Article 23*

With respect to paragraph 2 it is understood that if the mutual agreement procedure has been introduced within five years from the moment when the tax assessment became final, then any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

In WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Protocol. Done in duplicate at New Delhi this 2nd day of November, one thosuand nine hundred and ninety four in the Hindi German and English languages, all the texts being equally authentic, except in the case of doubt when the English text shall prevail.

For the Government of the republic of India :	For the Swiss Federal Council:
Sd./-	Sd./-
(T.S. SRINIVASAN)	(JEAN-PIERRE ZEHNDER)
Chairman,	Ambassador of Switzerland in
Central Board of Direct Taxes,	India
Ministry of Finance :	

[F. No. 501/7/73-FTD]

CIRCULAR / INCOME-TAX

Circular No. 704

Dated 28-4-1995

Sub :Instructions regarding determination of the 'date of transfer' and holding period for purposes of capital gains qua transactions in securities

Under the provisions of sub-section (42A) of section 2 of the Income-tax Act, 1961, the shares held in a company or any other security listed in a recognised stock exchange in India or units of the Unit Trust of India or units of mutual fund specified under section 10(23D) shall be regarded as short-term capital assets if they are held by an assessee for not more than 12 months immediately preceding the date of its transfer. Clarifications have been sought as to which date should be regarded as the date of transfer and also about the date from which the holding period of the securities should be reckoned. Clarifications have also been sought as to how the

holding periods will be computed for the purposes of capital gains when the securities, purchased in several lots at different points of time and which are taken delivery of in one lot, are subsequently sold in parts and no correlation of the dates of purchase and sale is available.

2. When the securities are transacted through stock exchange, it is the established procedure that the broker first enter into contracts for purchase/ sale of securities and thereafter, follow it up with delivery of shares, accompanied by transfer deeds duly signed by the registered holders. The seller is entitled to receive the consideration agreed to as on the date of contract. The Board are of the opinion that it is the date of broker's note that should be treated as the date of transfer in cases of sale transactions of securities provided such transactions are followed up by delivery of shares and also the transfer deeds. Similarly, in respect of the purchasers of the securities, the holding period shall be reckoned from the date of the broker's note for purchase on behalf of the investors. In case the transactions take place directly between the parties and not through stock exchanges the date of contract of sale as declared by the parties shall be treated as the date of transfer provided it is followed up by actual delivery of share and the transfer deeds.

3. As regards the second issue, where securities are acquired in several lots at different points of time, the First-in-First-out (FIFO) method shall be adopted to reckon the period of the holding of the security, in case where the date of purchase and sale could not be correlated through specific numbers of the scrips. In other words, the assets acquired last will be taken to be remaining with the assessee while assets acquired first will be treated as sold. Indexation, wherever applicable, for long-term assets will be regulated on the basis of the holding period determine in this manner.

NOTIFICATION / INCOME-TAX

Notification No. 9753 — *Dated 21-4-1995* — Notification u/s. 90 of the IT Act, 1961 — Double Taxation Avoidance Agreement between Govt. of the Republic of India and the Kingdom of Spain

Whereas the annexed Convention between the Government of the Republic of India and the Kingdom of Spain for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital has entered into force on 12th Jan., 1995 after the exchange of Instruments of Rectification as required by paragraph 2 of Article 30 of the said Convention;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said Convention shall be given effect to in the Union of India.

CONVENTION
BETWEEN THE
REPUBLIC OF INDIA
AND THE
KINGDOM OF SPAIN
FOR THE AVOIDANCE OF DOUBLE TAXATION
AND THE PREVENTION OF FISCAL EVASION
WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL

The Government of the Republic of India and the Government of the Kingdom of Spain desiring to conclude a Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on Income and on Capital have agreed as follows :

Article 1

Personal scope

This Convention shall apply to persons who are residents of one or both of the Contracting States.

Article 2

Taxes covered

1. This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

3. The existing taxes to which the Convention shall apply apply are in particular :

(a) in Spain :

(i) The Income-tax on Individuals (el Impuesto sobre la Renta de las Personas Fisicas);

(ii) The Corporation Tax (el Impuesto sobre Sociedades);

(iii) The Capital tax (el Impuesto sobre el patrimonio);

(hereinafter referred to as "Spanish Tax").

(b) in India :

(i) The income-tax including any surcharge thereon;

(ii) The surtax; and

(iii) The wealth-tax

(hereinafter referred to as "Indian tax").

4. This Convention shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting State shall notify to each other any significant changes which have been made in their respective taxation laws.

Article 3

General definitions

1. In this Convention, unless the context otherwise requires :

(a) the term "Spain' means the territory of Spain and includes the territorial sea and airspace above it. It also includes any other maritime zone in which Spain has sovereign rights, other rights and jurisdiction, according to the Spanish law and in accordance with international law;

(b) the term 'India' means the territory of India and includes the territorial sea and airspace above it. It also includes any other maritime zone in which India has sovereign rights, other rights and jurisdictions, according to the India Law and in accordance with international law;

(c) the terms " a Contracting State" and "the other Contracting State' mean Spain or India as the context requires;

(d) the term "tax" means "Indian tax" or "Spanish tax", as the context requires;

(e) the term "person" includes an individual, a company, any other body of persons or any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting State;

(f) the term "company' means any body corporate or any entity which is treated as a company or body corporate under the taxation laws in force in the respective Contracting State;

(g) the terms "enterprise of a Contracting State' and "enterprise of the other Contracting State" mean, respectively, an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

(h) the term "national" means :

(i) any individual possessing the nationality of a Contracting State;

(ii) any legal person, partnership and association deriving its status as such from the law in force in a Contracting State;

(i) the term "international traffic' means any transport by a ship or air craft operated by an enterprise of contracting state except when the ship or air craft is operated solely between places in the other contracting states;

(j) the term "competent authority" means

(i) in the case of Spain, the Minister of Economy and Finance or his authorised representative.

(ii) in the case of India, the Central Government in the Ministry of Finance (Department of Revenue) or its authorised representative.

2. In the application of this Convention by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the law of that Contracting State relating to the taxes which are the subject of this Convention.

Article 4

Resident

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of similar nature. but this term does not include any person who is liable to tax in that State in respect only of income from sources in that State, or capital situated therein.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules :

(a) He shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting States with which his personal and economic relations are closer (centre of vital interests).

(b) If the Contracting States in which he has his centre of vital interests cannot be determined, or if he has not a permanent homè avilable to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode.

(c) If he has a habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national.

(d) If he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.

Article 5

Permanent Establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially :

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) a warehouse in relation to a person providing storage facilities for others;

(h) a farm, plantation or other place where agriculture, forestry, plantation or related activities are carried on;

(i) a premises used as a sales outlet;

(j) an installation or structure used for the exploration or exploitation of natural resources, but only if so used for a period of more than three months;

(k) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than six months in any twelve month period, or where such project or supervisory activity, being incidential to the sale of machinery or equipment, continues for a period not exceeding six months and the charges payable for the project or supervisory activity exceed 10% of the sale price of the machinery and equipment.

Provided that, for the purpose of this paragraph an enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it provides services or facilities in connection with or supplies plant and machinery on hire used or to be used in, the prospecting for, or extraction or production

of mineral oils in the State if the activities continue for a period of more than thirty days in any twelve month period.

3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include :

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods and merchandise, or of collecting information for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.

4. Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 5 applies—is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if

(a) he has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise.

(b) he has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise itself or on behalf of that enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise,he will not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting

State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Article 6

Income from Immovable Property

1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. The term "immovable property' shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall also apply to income derived from the direct use, letting or use in any other from of immovable property.

4. The provisions of paragraph 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

Article 7

Business Profits

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In the determination of the profits of a permanent establishment, there

shall be allowed as deduction expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses, reserach and development expenses, interest and other similar expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State. However, no such deduction shall be allowed in respect of amounts,if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges, for specific services performed or for management, or,except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewsie, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalities, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprise,by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

5. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reasons to the contrary.

6. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8

Air Transport

1. Profits derived by an enterprise of a Contracting State from the operation of aircraft in international traffic shall be taxable only in that State.

2. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

3. The term "operation of aircraft" shall mean business of transporation by air of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of aircraft, including the sale of tickets for such transportation on behalf of other enterprises, the incidental lease of aircraft and any other activity directly connected with such transportation.

Article 9

Shipping

1. Profits derived by an enterprise of a Contracting State from the operation of ships in international traffic shall be taxable only in that State.

2. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency engaged in the operation of ships.

3. For the purposes of this Article, profits derived from the operation of ships include profits from the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) in connection with the transport of goods or merchandise in international traffic.

Article 10

Associated Enterprises

Where

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(b) the same persons participate, directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Article 11

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed 15% of the gross amount of the dividends.

This paragraph shall not effect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraph 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent or fixed base. In such case the provisions of Article 7 or Article 15, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly or profits or income arising in such other State.

Article 12

Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest , may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 15% of the gross amount of the interest.

3. Notwithstanding the provisions of paragraph 2 :

(a) interest arising in a Contracting State shall be exempt from tax in that State provided it is derived and beneficially owned by :

(i) the Government, a political sub-division or a local authority of the other Contracting State; or

(ii) the Central Bank of the other Contracting State;

(b) interest arising in a Contracting State shall be exempt from tax in that Contracting State to the extent approved by the Government of that State if it is derived and beneficially owned by any person [other than a person referred to in sub-paragraph (a)] who is a

resident of the other Contracting State provided that the transaction giving rise to the debt-claim has been approved in this regard by the Government of the first-mentioned Contracting State.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 15, as the case may be, shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the interest whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 13

Royalties and fees for Technical Services

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed

in the Contracting State in which they arise and according to the law of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed :

(i) in the case of royalties relating to the payments for the use of, or the right to use, industrial, commercial or scientific equipment, 10% of the gross amount of the royalties;

(ii) in the case of fees for technical services and other royalties, 20% of the gross amount of fees for technical services or royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematographic films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. The term "fees for technical services" as used in this Article means payments of any kind to any person other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 15 (Independent Personal Services), in consideration for the services of a technical or consultancy nature, including the provision of services of technical or other personnel.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15, as the case may be, shall apply.

6. Royalties and fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred and such royalities or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

r. Where, by reason of a special relationship between the payer and the eneficial owner or between both of them and some other person, the mount of the royalties or fees for technical services paid, exceeds the nount which would have been paid in the absence of such relationship, e provisions of this Article shall apply only to the last-mentioned amount. such case, the excess part of the payments shall remain taxable according the laws of each Contracting State, due regard being had to the other ovisions of this Convention.

Article 14

Capital Gains

Gains derived by a resident of a Contracting State from the alienation immovable property, referred to in Article 6, and situated in the other ntracting State may be taxed in that other State.

Gains from the alienation of movable property forming part of the siness property of a permanent establishment which an enterprise of a ntracting State has in the other Contracting State or of movable property taining to a fixed base available to a resident of a Contracting State the other Contracting State for the purpose of performing independent rsonal services, including such gains from the alienation of such a rmanent establishment (alone or together with the whole enterprise) or such fixed base, may be taxed in that other State.

Gains from the alienation of ships or aircraft operated in international ffic or of movable property pertaining to the operation of such ships aircraft shall be taxable only in the Contracting State of which the alienator a resident.

Gains from the alienation of shares of the capital stock of a company property of which consists, directly or indirectly, principally of movable operty situated in a Contracting State may be taxed in that State.

Gains from the alienation of shares of the capital stock of a company rming part of a participation of at least 10% in a company which is a sident of a Contracting State may be taxed in that Contracting State.

Gains from the alienation of any property other than that mentioned paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting ate of which the alienator is a resident.

Article 15

Independent Personal Services

Income derived by a resident of a Contracting State from the performance rofessional services or other independent activities of a similar character all be taxable only in that State except in the following circumstances ien such income may also be taxed in the other Contracting State :

(a) if he has a fixed base regularly available to him in the other

Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or

(b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in the relevant "taxable year"; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term "professional services" includes independent scientific, literacy, artistic, educational or teaching activities, as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

Article 16

Dependent Personal Services

1. Subject to the provisions of Articles 17, 18, 19, 20, 21 and 22,salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State, if :

(a) the recipient is present in other State for a period or periods not exceeding in the aggregate 183 days in the relevant "taxable year", and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, by an enterprise of a Contracting State may be taxed in that State.

Article 17

Director's Fees

Director's fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 18

Artistes and Athletes

1. Notwithstanding the provisions of Articles 15 and 16, income derived by a resident of a Contracting State as an entertainer, such as theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles, 7, 15 and 16, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised.

3. Notwithstanding the provisions of paragraphs 1 and 2, income derived by an entertainer or an athlete who is a resident of a Contracting State from his personal activities as such exercised in the other Contracting State, shall be taxable only in the first-mentioned Contracting State, if the activities in the other Contracting State are supported wholly or substantially from the public funds of the first-mentioned Contracting State, including any of its political sub-divisions or local authorities.

Article 19

Pensions

Subject to the provisions of paragraph 2 of Article, 20, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.

Article 20

Remuneration and Pensions in respect of Government Service

1. (a) Remuneration, other than a pension, paid by a Contracting State or a political sub-division or a local authority thereof to an individual in respect of services rendered to that State or sub-division or authority shall be taxable only in that State.

(b) However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that other State and the individual is a resident of that State who :

- (i) is a national of that State; or
- (ii) did not become a resident of that State solely for the purpose of rendering the services.

2. (a) Any pension paid by, or out of funds created by, a Contracting State or a political sub-division or a local authority thereof to an individual in respect of services, rendered to that State or sub-division or authority shall be taxable only in that State.

(b) However, such pension shall be taxable only in the other Contractin State if the individual is a resident of , and a national of, that other State.

3. The provisions of Articles 16, 17 and 19 shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by a Contracting State or a political sub-division or a local authorit thereof.

Article 21

Students

Payments which a student or business apprentice who is or was immediatel before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose c his education or training receives for the purpose of his maintenance education or training shall not be taxed in that State, provided that suc payments arise from sources outside that State.

Article 22

Payments received by Professors, Teachers and Research Scholars

1. A professor or teacher who is or was a resident of one of the Contractin States immediately before visiting the other Contracting State for the purpose of teaching or engaging in research, or both, at an officiall recognised university, college, school or other institution in that other Contracting State shall be exempt from tax in that other State on an remuneration for such teaching or research for a period not exceeding tw years from the date of his arrival in that other State.

2. This Article shall not apply to income from research if such research is undertaken not in the general interest but primarily for the private benefi of a specific person or persons.

Article 23

Other Income

1. Subject to the provisions of paragraph 2, items of income of a residen of a Contracting State, wherever arising, which are not expressly dealt witl in the foregoing Articles of this Convention, shall be taxable only in tha Contracting State.

2. The provision of paragraph 1 shall not apply to income, other thar income from immovable property as defined in paragraph 2 of Article, 6 if the recipient of such income, being a resident of a Contracting Stat carries on business in the other Contracting State through a permanen establishment situated therein, or performs in that other State independen personal services from a fixed base situated therein, and the right or propert in respect of which the income is paid is effectively connected with suc

permanent establishment, or fixed base. In such a case the provisions of Article 7 or Article 15, as the case may be, shall apply.

3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Convention, and arising in the other Contracting State may be taxed in that other State.

Article 24

Capital

1. Capital represented by immovable property referred to in Article 6, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.

2. Capital represented by movable property forming part of the business property or a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or by movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, may be taxed in that other State.

3. Capital represented by ships or aircraft, operated in international traffic or by movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the enterprise operating such ships, aircraft or property is a resident.

4. Capital represented by shares of the capital stock of a company the property of which consists, directly or indirectly, principally of movable property situated in Contracting State may be taxed in that State.

5.Capital represented by shares of the capital stock of company which is a resident of a Contracting State representing a participation of at least 10 per cent in the capital stock of that company may be taxed in that Contracting State.

6. All other elements of capital of a resident of a Contracting State shall be taxable only in that Contracting State.

Article 25

Elimination of Double Taxation

1. The laws in force in either of the Contracting State will continue to govern the taxation of income and capital in the respective Contracting State except where express provisions to the contrary are made in this Convention.

2. In India, double taxation will be avoided in the following manner :

(a) Where a resident of India derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in Spain, India shall allow :

(i) as a deduction from the tax on the income of that resi an amount equal to the income-tax paid in Spain, wh directly or by deduction; and

(ii) as a deduction from the tax on the capital of that resi an amount equal to the capital tax paid in Spain.

Such deduction in either case shall not, however, exceed that of the income-tax or capital tax, as computed before the dedu is given, which is attributable, as the case may be, to the inc or the capital which may be taxed in Spain.

(b) Where a resident of India derives income or owns capital w in accordance with the provisions of this Convention, sha taxable only in Spain, India may include this income or capi the tax base but shall allow as a deduction from the incom or capital tax, that part of the income-tax or capital tax whi attributable, as the case may be, to the income derived fro the capital owned in Spain.

3. In Spain, subject to the provisions of its internal law, double tax will be avoided in the following manner :

(a) Where a resident of Spain derives income or owns capital w in accordance with the provisions of this Convention, may be in India, Spain shall allow :

(i) as a deduction from the tax on the income of that resi an amount equal to the Income-tax paid in India :

(ii) as a deduction from the tax on the capital of that resi an amount equal to the capital tax paid in India.

(b) In the case of a dividend paid by a company which is a res of India to a company which is a resident of Spain and which at least 25 per cent of the capital of the company payin dividend, the deduction shall take into account (in addition to deduction provided under sub-paragraph (a) the income-tax in India by the company in respect of the profits out of which dividend is paid provided that such tax is taken into accou calculating the base of the Spanish tax.

Such deduction in either case shall not, however, exceed that of the income tax or capital tax, as computed before the dedu is given, which is attributable as the case may be, to the inc or the capital which may be taxed in India.

(c) Where in accordance with any provision of the Convention in derived or capital owned by a resident of Spain is exempt tax in Spain, Spain may nevertheless, in calculating the am of tax on the remaining income or capital of such resident, into account the exempted income or capital.

4. For the purposes of deduction referred to paragraph 3, the term "Income-tax paid in India" shall be deemed to include any amount which would have been payable as Indian tax under the laws of India and in accordance with this Convention for any year but for an exemption from, or reduction of, tax granted for that year under :

(i) Sections 10(4), 10(15)(iv), 10A, 10B, 23A, 32AB, 80HH, 80HHC and 80-I of the Income-tax Act, 1961 (43 of 1961) so far as they were in force on, and have not been modified since, the date of the signature of this Convention, or have been modified of this Convention, or have been modified only in minor respects so as not to affect their general character; or

(ii) any other provision which may be enacted hereafter granting a deduction in computing the taxable income or an exemption or reduction from tax which the competent authorities of the Contracting State agree to be of a substantially similar character if it has not been modified thereafter or has been modified only in minor respects so as not to affect its general character.

5. The provisions of paragraph 4 shall apply for the first 10 years for which this Convention is effective but the competent authorities of the Contracting State may consult each other to determine whether this period shall be extended.

Article 26

Non-discrimination

1. The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances and under the same conditions are or may be subjected.

2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities in the same circumtances or under the same conditions.

3. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

4. Except where the provisions of Article 10, paragraph 7 of Article 12, or paragraph 7 of Article 13, apply, interest, royalties and other

disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first mentioned State. Similarly, any debts of an enterprise of a Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

Article 27

Mutual Agreement Procedure

1. Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, notwithstanding the remedies provided by the national law of those States, present his case to the competent authority of the Contracting State of which he is a resident, or if his case comes under paragraph 1 of Article 26 to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention. The competent authorities shall also, by mutual agreement, develop appropriate actions, methods and techniques to improve the exchange of information carried out under Article 28 of this Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States.

Article 28

Exchange of Information

1. The competent authorities of the Contracting States shall exchange

such information (including copies of documents when relevant) as is necessary for carrying out the provisions of the convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention, in so far as the taxation thereunder is not contrary to the Convention, in particular for the prevention of fraud or tax evasion and of tax avoidance. The exchange of information is not restrict by Article 1. Any informations received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic law of that State. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including Courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes which are the subject of the Convention. Such persons or authorities shall use the information only for such purposes but may disclose the information in public Court proceedings or in judicial decisions.

2. In no case shall be provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation :

(a) to carry out administrative measures at variance with the laws or administrative practice of that or of the other Contracting State.

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State.

(c) to supply information which would disclose any trade, business industrial, commercial or professional secret trade process or information the disclosure of which would be contrary to public policy.

Article 29

Diplomtic and Consular Officers

Nothing in this Convention shall affect the fiscal privilage of diplomatic agents or consular officers under the general rules of international law or under the provisons of special agreements.

Article 30

Entry into force

1. This Convention shall be ratified and the instruments of ratification shall be exchanged at as soon as possible.

2. This Convention shall enter into force upon the exchange of the instruments of ratification and its provisions shall have effect :

(a) in Spain :

in respect of taxes chargeable on income or on capital for any taxable year beginning on or after the first day of January of the

calender year next following that in which the Convention enters into force.

(b) in India;

(i) in respect of income arising in any taxable year beginning on or after the first day of April of the Calendar year next following that in which the Convention enters into force.

(ii) in respect of capital which is held on the last day of any taxable year beginning on or after the first day of April of the calendar year next following that in which the Convention enters into force.

Article 31

Termination

1. The Convention shall remain in force indefinitely, but either of the Contracting States may, on or before the thirtieth day of June in any calendar year beginning after the expiration of a period of five years from the date of its entry into force, give to the other Contracting State through diplomatic channels, written notice of termination. In such event, the convention shall cease to have effect :

(a) in Spain, in respect of taxes chargeable for any taxable year beginning on or after the first day of January of the calendar year next following that in which the notice of termination is given ;

(b) in India, in respect of income arising in any taxable year beginning on or after the first day of April of the calendar year next following that in which the notice of termination is given and in respect of capital which is held on the last day of any taxable year beginning or or after the first day of April next following the calendar year in which the notice of termination is given.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

Done in duplicate at New Delhi this 8th day of February, one thousand nine hundred and ninety three in the Hindi, Spanish and English language, all the texts being equally authentic. In case of divergence between any of the texts, the English text shall be the operative one.

For the Government of the	For the Government of the
Republic of India	Kingdom of Spain
Sd/-	Sd/-
(MANMOHAN SINGH)	(JAVIER SOLANA MAD RIAGA)
Minister of Finance	Minister of Foreign Affairs

PROTOCOL

At the moment of signing the Convention between the Government of the Republic of India and the Government of the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on Income and on Capital, the undersigned have agreed upon the following provisions which shall be an integral part of the Convention.

1. In respect of clause (d) of paragraph 1 of Article 3 (General Definitions) it is understood that the term "tax" shall not include any amount which is payable in respect of any default or omission in relation to the taxes to which this Convention applies or which represents a penalty imposed relating to those taxes.

2. In respect of clause (g) of paragraph 2 of Article 5 (Permanent Establishment) it is understood that this clause refers to a warehouse where space is rented to other persons.

3. In respect of clauses (b) and (c) of paragraph 1 of Article 7 (Business Profit) it is understood that in the case of any doubt as to whether the goods or merchandise sold are of the similar kind as those sold through the permanent establishment or whether the other business activities carried on are of the similar kind as those effected through the permanent establishment, the competent authorities may consult each other with a view to resolving the case may by mutual agreement.

4. In respect of paragraph 3 of Article 7 (Business Profits) it is understood that in case of any substantial changes in the provisions of the taxation laws of a Contracting State relating to limitation on the deductibility of the expenses which are incurred for the purposes of the business of a permanent establishment, the competent authorities of the Contracting States shall consult each other on the necessity of modifying the provisions of this paragraph.

5. In respect of Article 8 (Air Transport) and Article 9 (Shipping), it is understood that interest on funds connected with the operation of aircraft or ships in international traffic shall be regarded as profits derived from the operation of such aircraft or ships, as the case may be, and the provisions of Article 12 (Interest) shall not apply in relation to such interest.

6. Paragraph 2 of Article 11 (Dividends), shall not be applicable, in the case of Spain, to the income attributable, whether distributed or not, to the shareholders of the corporations and entities referred to in Article 12.2 of Law 44/1978 of 8 September, 1978, and Article 19 of Law 61/1978 of 27 December, 1978, as long as the said income is not subject to the Spanish Corporation Tax. Such income may be taxed in Spain according to its internal Law.

7. The competent authorities shall initiate the appropriate procedure to

review the provisions of Article 13 (Royalties and fees for technical servic after a period of five years from the date of its entry into force. Howev if under any Convention or Agreement between India and a third Sta which is a Member of the OECD, which enters, into force after 1st Januar 1990, India limits its taxation at source on royalties or fees for technic services to a rate lower or a scope more restricted than the rate or sco provided for in this Convention on the said items of incomes, the san rate or scope as provided for in that Convention or Agreement on the sa items of income shall also apply under this convention with effect fr the date on which the present Convention comes into force or the releva Indian Convention or Agreement, whichever enters into force later.

8. In respect of paragraph 2 of Article 26 (Non-discrimination), it understood that the provisions of this paragraph shall not be construed preventing a Contracting State from charging the profits of a permane establishment which an enterprise of the other Contracting State has the first-mentioned State at a rate of tax which is higher than that impos on the profits of a similar enterprise of the first-mentioned State, nor being in conflict with the provisions of paragraph 3 of article 7 (Busine Profits) of this Convention. It is also understood that in no case the taxati of a permanent establishment which an enterprise of a Contracting St has in the other Contracting State shall be less favourably levied than taxation levied on a permanent establishment of an enterprise of a thi State carrying on the same activities under a double taxation Conventi concluded by the other Contracting State with that third State.

9. Notwithstanding the provisions of paragraph 4 of Article 26 (Non- crimination) it is understood that in the case of India, payments by w of interest, royalties and fees for technical services made by an enterpri of India to a resident of Spain, shall not be allowed as a deduction for purpose of determining the taxable profits of such enterprise unless t has been paid or deducted at source from such payments under Indian la and in accordance with the provisions of this Convention.

10. For the purpose of this Convention it is understood that the te "taxable year" in the case of India shall mean the "previous year" as defin in the Income-tax Act, 1961.

IN WITNESS WHEREOF the undersigned, being duly authorised theret have signed the present Protocol.

Done in duplicate at New Delhi this 8th of February, one thousand ni hundred and ninety three in the Hindi, Spanish and English languages, the texts being equally authentic. In case of divergence between any of texts, the English text shall be the operative one.

For the Government of the	For the Government of the
Republic of India	Kingdom of Spain
Sd/-	Sd/-
(MANMOHAN SINGH)	(JAVIER SOLANA MAD RIAGA)
Minister of Finance	Minister of Foreign Affairs

MAGAZINE

Tax Laws : Their Rationalisation and Simplifications
(A fresh look)

By

S.P. Pahwa

Rationalisation and simplification is a continuing process. It is known to the readers of TAXATION that Shri S.P. Pahwa, Ex. IRS and Corporate Tax Planner has been writing with particular aim of reduction in unwanted litigation including the suggestion that the appeals etc. should be filed only after careful study of the case though tax at stake is one of the main consideration for the Department. Now, Parliamentary Standing Committee with regard to working of the CBDT has suggested, practically, as outlined by Shri S.P. Pahwa from time to time. Some of the suggestions have been highlighted in this article.

The concept of rationalisation and simplification in any field is unending. Time is a big factor and with passage of time and growing civilisation and the need for human welfare constitute the path for a departure from the old law or tradition. Without going into annals of history, it would suffice to say that the Indian Income-tax Act, 1922 was codified and after deliberations of many experts and Committees, the new Act, 1961 came into force with effect from 1-4-1962 i.e. from the assessment year 1962-63. This change did give some transit-troubles but slowly the Income-tax Act, 1961 with numerous amendments from time to time had come to stay in its 34th year.

2. As is known to all that the Income-tax Act, 1961 even now do contain some of the provisions which had become redundant and practically are not used either by the department or by the tax payer. Hence all such provisions which are only existing on paper should be removed forthwith - a step for rationalisation and simplification.

3. Taxation Policy has a major role to play and it all depends on the Government in force including the present Finance Minister (i.e.) the Finance Minister at a particular time). It may be re-called that at one time a proposal was made for long term fiscal policies including tax laws and it was desired that no amendment need be made in the Tax Laws at least for three years (a very reasonable period for the legislative provision to be implemented). But, it has been seen that for some reason or the other, a particular section of the Income-tax Act had been amended number of times. I am not referring to particular sections but the only point to be stressed is that the provision

made should stay for some time so that its implications, good or bad, are seen. Here it becomes inevitable to mention that the Hotel Receipts Tax Act was brought into force but was lifted as such after few months. (One can well imagine the cost of bringing out an enactment).

4. The need for tax reforms is a continuing process and it cannot be said that once a provision is made, it has to remain in force. It has been seen that with the modernisation of various industries vis-a-vis establishment of new industries, specially in a developing country, like India (though half a century would be completed in two years' time or so and this period of 50 years is normally a big period in the history of Nation) the need for tax incentive has to be there and will continue. But what is needed is well thought out provisions to stay in force for some time. Long ago it had been pointed out in various decisions that ambiguity in a taxing statute should be avoided and if there is any ambiguity, the benefit has to go to the assessee. Without multiplying the ratios laid down, it would suffice to refer to the Supreme Court's decision in the case of *Commissioner of Income-tax vs. Vegetable Products Ltd.* (1973) Taxation xxxiv(3) 95 (SC), (1973) 88 ITR 192 that if the court finds that the language of a taxing provision is ambiguous or capable of more meanings than one, then the Court has to adopt that interpretation which favours the assessee, more particular so where the provision relates to the imposition of penalty.

5. Interpretation of particular provisions have also given rise to the need for rationalisation and simplification. The courts have placed different interpretations and the settled legal position is that the courts have to look at the words of a section and if a case clearly comes within the section, the subject is taxed and not otherwise. When the difference of opinion is known to the Government, why delay the step for simplication. If the Government comes out early with its decision, further litigation is stopped.

6. In interpretation of statutes, normally the Honourable Judges rely on what they regard as a 'sensible' or 'common sense' interpretation, of course keeping in view the legislative intent for making the provision, in order to reach the true meaning of the statutory provision. For instance, the Affiliation Proceedings Act, 1957, referred to an application by 'single woman' who is with child or who has been delivered of an illegitimate child. It was interpreted that the phrase 'single woman' referred to the woman's condition at the time of the application and not at the time of birth. This was considered to be a fairly and common sense interpretation whether the woman sought to receive the money for the support of the child must surely depend on her circumstances at the time when she seeks the order.

7. In interpretation of tax laws, there have been some words leading to lot of controversy i.e. words like 'from India' and 'in India' for purposes of export incentives. Though the expressions used are simple but in actual practice; they had to come in for various interpretations from Tax Experts. Here it would be worthwhile to mention that the Supreme Court held in the case of *Indian Chamber of Commerce vs. CIT* (1975) 101 ITR 796:

'we dare say that the achieving greater simplicity and clarity in statute law will be taken up by the draftsman of the legislative bills to avoid playing linguistic games in court and promotion of interpretative litigation. Lawyers and legislators must stop confusing each other and start talking to their audience - the people - so that communication problems may not lead to prolific forensic battles'.

8. In my earlier articles published in this leading journal, I had stressed the need for uniformity, to the extent possible, in the interpretation of taxing statute. As a Tax Scholar, I wish the provisions to work for some time and if a new opinion had been express by a particular honourable court/tribunal, the Government should come out with its view immediately so that some litigation may stop. For example, about one and half year back, one of the Appellate Tribunal had held a Government Undertaking to be a charitable institution and I believe the point at issue must be pending. The point from rationalistion thinking is that whether a Government undertaking can be equated as 'charitable institution' and if they cannot be equated, then some sort of special provision or early final verdict from the Apex Court can settle the issue.

9. Now, this year, the Budget had been divided in three phases and in view of the political situation, there may be no time for simplification and rationalisation. But these suggestions are of long duration and could need time. Recently, the Parliamentary Standing Committee on Finance has strongly recommended further simplification and rationalisation of the Income-tax Laws in order to bring down litigation. (See the *Economic Times* dated 13-3-1995.) Actually, the crux of my various articles in Taxation and other papers had been 'uniformity of application of tax laws to the whole of India and uniformity in interpretation of the statutory provisions to the extent possible' and 'minimum litigation'. This is what the Honourable Standing Committee had accepted in the 10th report on the working of the Central Board of Direct Taxes. The following suggestions made by the Committee would go a long way in achieving the desired objects of rationalisation :

(i) Setting up of a committee of persons from various walks of life i.e. Lawyers, Chartered Accountants, Taxmen, Trade representatives headed by a retired Judge of the Supreme Court to suggest methods for simplificatio,.

(ii) Requesting the Courts to expedite the disposal of pending cases,

(iii) Checks on the exemptions and benefits so that there is no tax evasion,

(iv) No ambiguity in the legislative words,

(v) To know the causes of dissatisfaction of the Assessees,

(vi) Fact finding decisions to be followed by the Assessing Officer, and

(vii) Thorough scrutiny of the case before a petition or special leave petition is filed before the Court.

Income-tax incentives for infrastructural development

By

R. Santhanam

The 1995 budget seeks to encourage infrastructural development by providing income-tax incentives for the purpose. While the broad objective of the scheme is laudable it is difficult to say whether it would be achieved by the proposals brought out in the budget. The government wants under the new scheme that the infrastructural developments involving highly capital intensive industries of investments to be undertaken by the private sector which should also maintain the same at enormous costs of operation and maintenance. It is doubtful whether in any of the highly intensive investments in infrastructural development any profit specified in the Income-tax Act as proposed to be amended in Section 80-IA. Consequently the scheme for exemption would be illusory and ineffective and may at the best serve the purpose of decorating the statute. Further difficulty would be arising from the requirement of transfer of ownership of the infrastructural facilities developed by the assessee to the government or local authorities and if the assessee has to invest huge monies and also disclaim the ownership or any right therein the investors would not be forthcoming. Infrastructural development is essentially the responsibility of the Central and State Governments who should utilise all their time, talents, monies and resources for the purposes instead of meeting wasteful government expenditure on establishment and allied areas. The government should not shirk its responsibility and shift the burden to the private sector by showing an incentive which is effectively illusory, if at all necessary, purposeful and result oriented by granting tax holiday not from the year of commencement of operation but from the year of earning of income. The condition for ownership to be transferred to the Government should also be dispensed with as otherwise no investment in infrastructural development from the private sector would be forthcoming.

1. Budget Proposal

In his Budget Speech to the Parliament on 15th March 1995 the Union Finance Minister stated that "Inadequate infrastructure is a key constraint to our economic progress. In order to promote expansion of quality infrastructure, I propose to allow a five-year tax holiday for any enterprise which builds, maintains and operates infastructure facilities in the area of

highways, expressways and new bridges, airports, ports and rapid mass transport systems. This tax holiday will be available to enterprises which commence operation after 1st April, 1995. As an incentive to financial institutions to provide long-term finance for development of such infrastructure, I propose to allow deduction of upto 40 per cent of their taxable income derived from financing of these investments provided this amount is credited to a special reserve."

2. New Provisions

To give effect to this budget proposal clauses 10 and 19 of the Finance Bill, 1995 seek to amend the provisions of section 36(1)(viii) and section 80-IA of the Income-tax Act, respectively, from 1st April, 1996. The Notes on clauses appended to the Finance Bill and the memorandum explaining the provisions of the Finance Bill highlight the scope of the new provisions. According to the official version. "Under the provisions of section 80-1A, new industrial undertakings are allowed a deduction of 25% (30% for companies) for the first ten years (twelve years for the co-operative sector) of production. However, to an industrial undertaking engaged in the generation or generation and distribution of power or to an industrial undertaking set up in specified backward States/districts, a five year full tax holiday is allowed. For undertakings entitled to the five-year full tax holiday, normal deduction of 25% (30% for companies) is allowed for the balance period after the five year holiday.

Industrial modernisation requires a massive expansion of, and qualitative improvement in, infrastructure. Our country is very deficient in infrastructure such as expressways, highways, airports, ports and rapid urban rail transport systems. Additional resources are heeded to fulfil the requirements of the country within a reasonable time frame. In many countries the BOT (build-operate-transfer) or the BOOT (Build-own-operate-transfer) concepts have been utilised for developing new infrastructure.

Applying commercial principles in the operation of infrastructure facilities can provide both managerial and financial efficiency. In view of this, it is proposed to allow a five-year tax holiday for any enterprise which builds, maintains and operates any infrastructure facility such as roads, highways or expresways or new bridges, airports, ports and rapid rail transport systems on BOT or BOOT or similar other basis (where there is an ultimate transfer of the facility to a Government or public authority). The enterprise must have entered into an agreement with the Central or State Government or a local authority or any other statutory authority for this purpose. The period within which the infrastructure facility has to be transferred needs to be stipulated in the agreement between the undertaking and the Government concerned. The tax holiday will be in respect of income derived from the use of infrastructure facilities developed by them.

The five-year period will be counted from the year in which the infrastructure

facility becomes operational. It will apply in respect of infrastructure facilities becoming operational on or after 1-4-1995.

The proposed amendment will take effect from 1st April 1996 and will, accordingly, apply in relation to assessment year 1996-97 and subsequent years (Clause 19).

Under clause (viii) of sub-section (1) of section 36 of the Income-tax Act, 1961 an approved financial corporation engaged in providing long-term finance for industrial or agricultural development in India, or an approved public company formed and registered in India with the main object of carrying on business of providing long term finance for construction of an amount not exceeding 40 per cent of its total income carried to a special reserve. The deduction is allowed on the 'total income' and not with reference to the income from the activities specified in section 36(1)(viii).

These organisations have diversified their activities and are claiming deduction under this section even in respect of their income from activities other than those specified in this section. There is no justification for allowing the deduction with reference to income from other activities or from sources other than business. It is, therefore, proposed to limit the deduction of 40% only to the income derived from providing long-term finance for the activities specified in section 36(1)(viii). It will thus take outside the purview of deduction, income arising from other business activities or from sources other than business.

Development of infrastructure is an important area requiring fiscal support for encouraging private sector participation. The Bill proposes to amend section 36(1)(viii) of the Income-tax Act to extend the benefit of deduction upto 40% of the income credited to special reserve account to approved financial corporations providing long-term finance for development of infrastructure facilities in India.

The proposed amendments will take effect from 1st April, 1996 and will, accordingly, apply in relation to assessment year 1996-97 and subsequent years."

3. Appraisal

It may thus be seen that both the incentives are intended to achieve rapid infrastructural development but the issue whether these two provisions would help to achieve the objective remains to be examined by taking a realistic look at the scheme of exemption/deduction proposed in the Finance Bill. The scheme of tax holiday under section 80-IA being extended is welcome to the extent it demonstrates a desire on the part of Government to encourage the growth of industrial infrastructure and base which are vital in areas of infrastructural development.

The conditions and limitations placed on the taxpayer for availing of the tax relief are so worded that in many cases the incentive or relief would

be essentially on paper and the new provisions in law would be decorative of the taxing statute without being able to achieve the real objective. The grant of an incentive must be whole-heartedly to achieve the objective and not to provide a lip-sympathy for a cause. In the present case the amendment to section 80-IA would, strictly speaking, remain an incentive on paper because of the incentive being offered as a deduction from gross total income, that too, only when profits and gains are derived by the assessee from the activities of providing infrastructure.

It is well known that all projects involving development of infrastructural facilities are highly capital intensive and for such projects neither loans and advances are easily given by public financial institutions, banks etc. nor investment from the public in the form of equity shares, debentures etc. would be easily forthcoming. The cost of building a dam, bridge, road, highway or other systems for transport etc. is so high that the money invested cannot be easily recouped even within the next ten years after it is open to public traffic. The collections by way of octroi, etc. on daily basis from the users would not be adequate to generate sufficient income which, after meeting all the expenses on maintenance, cost of establishment, interest costs on the investments already made, depreciation charges etc. would not leave the taxpayer with adequate income and invariably there would be a loss in the first, say, 10 years or so. In such a situation the grant of an exemption from income-tax when income itself does not arise from a particular business venture is not only illusory but alos meaningless and misleading

The further requirement that the ownership of the infrastructure developed by the assessee should be made to vest with the Government or other public authority involving ultimate transfer of the ownership of the capital asset by the assessee to the Government after incurring huge expenses and cost would dampen the enthusiasm of any one to take part in infrastructural development. In fact, it is the Government at the Central and State levels which must take upon themselves all the responsibilities for development of infrastructure and most of the expenditure on capital outlays as per the five year plans and annual plans of the Centre as well as the States must be directed to augment the infrastructural development and instead of the Government utilising all the resources for these purposes, the valuable resources are frittered away in lot of wasteful and avoidable expenses which do not go to enrich the nation. As a result the growth of the economy suffer.

It is the paramount duty of the Government to utilise available resources for infrastructural development so as to bring about rapid economic growth coupled with provision of various schemes for accelerating employment opportunities for the vast majority of the population which continues to remain below the poverty line. The various poverty alleviation programmes of the Centre and the States must be aimed at not only providing employment

but also utilising available resources simultaneously for growth of infrastructure and its maintenance. This is an area with vast employment potential and being highly labour intensive and capital intensive priority should be accorded to schemes for infrastrutural development a compared to other wasteful and avoidable expenses on Government establishments being incurred by the Centre and the States.

In any case, incorporating a special provision in the Income-tax Act to grant exemption from tax when income itself does not exist or arise is of no use. If at all the Government is sincere in providing an incentive, it should be meaningful and the exemption should become operative and applicable not from the year in which the infrastructural facility becomes operational but from the year in which the infrastructural facility results in income being derived which is liable to tax, but not earlier.

Further, the requirement of the ownership of infrastructural facility developed by the assessee being transferred to and vested in the Government or other statutory authority or local body would make it all the more a disincentive because the tax laws in relation to taxpayers engaged in business or commercial activities must take into account the commercial nature of the activity. If the person concerned is required to develop infrastructural facility and hand over the same to the Government without any benefit for himself there is no reason why should anyone (other than charitable institutions) come forward to carry out charitable or philanthropic programmes including also in matters of public utility services.

Suggestions

The Government cannot expect taxpayers to put in their money, time and efforts as also talents and leave them in the lurch after the stipulated period by taking over the ownership and other rights in regard to the development of infrastructural facilities. The proper course would be for the Government to divert all its attention, time, talent and resources for the development of infrastructural facilities throughout the country with whole-hearted co-operation between the Centre and the States so that the development of infrastructural facilities becomes a reality and is achieved by constant work and investment on the one hand and by providing continuous avenue for employment to the under-privileged masses of the country who live below the poverty line and who need the moneys spent in this direction. Only by diverting Governmental efforts and resources in this manner can the Government fulfil the paramount need of infrastructural development on the one hand and continuous employment opportunities to the poor and needy on the other and this being a social and essential requirement of discharge of the Government's own duties to the people under the Constitution it would be unfair to expect taxpayers to shoulder the responsibility,

Fiscal incentives under Indo-Italian tax agreement

By

Surendra Bhargava

Indo-Italian bilateral trade registered a 39% increase in 1993, and another 24% increase in the first half of 1994. Italy's exports to India grew by over 45% in 1993 and by more than 37% in Jan-June, 1994. Since the liberalisation of the Indian economy, in 1991, more than 180 joint venture agreements have been signed between Indian companies and their Italian counterparts. In many ways, Italy can be an ideal partner in the development of the Indian economy. India offers to Italian companies abundant natural resources and low cost skilled labour, manufacturing base for supply to many countries in addition to vast domestic market of 250m people. Italy also offers the best of both worlds for foreign investors free and unrestricted transfer of remittances and liberal investment incentives in the southern part of the country. Coupled with the fiscal incentives under the Indo-Italian treaty discussed here by the learned author these incentives will lead to significant growth to the bilateral ties.

1. Applicability of agreement :

The Indo-Italian Double Taxation Avoidance Agreement will apply in India for and from April 1, 1977 and in Italy for and from the taxable period to January 1, 1977. The treaty applies to persons who are resident of either India or Italy or both. The agreement in India shall cover individual, HUF, firm, AOP, BOI, local authority and artificial juridical person including a company.

The agreement applies to Income-tax including any surcharge thereon and surtax on companies and in the case of Italy it covers not only personal income-tax and corporate income-tax but local income-tax also. Unlike our agreement with FRG, Indo-Italian agreement does not specifically refer to interest, fines and penalties imposed by each State pursuant to its domestic laws. Any question whether such items are being imposed or paid in connection with covered taxes in a manner consistent with provisions of the agreement, such as non-discrimination clause may, however, be resolved by competent authorities pursuant to mutual agreement procedure. The agreement also provides that it will also apply to any taxes identical or substantially similar to the taxes on income in existence on the date of signature of the present agreement which are imposed in addition to, or in place of the taxes referred to here. For this purpose, the competent authorities of the two States are to notify to each other any changes in the enumerated taxes which have been made in their respective taxation

laws subsequent to the agreement. Copies of relevant enactments and regulations shall be furnished to each other at the end of each year.

2. Relevance of Residential Status :

The definition of the firm 'resident' is very important for the applicability of the agreement. Hence, there is a separate, detailed article on it. The definition begins with a person's liability to tax as a resident under the respective taxation laws of the two States. A person who, under those laws, is a resident of one State and not the other need look no further. However, the agreement assigns residence to one State or the other (single residence) for the purposes of the agreement in circumstances where each of the States believes a person to be its resident. However, the definition under the agreement is exclusively for the purposes of the agreement in circumstances where each of the State believes a person to be its resident. However, the definition under the agreement is exclusively for the purposes of the agreement. There are separate rules for residence for individuals and non-individuals. A non-individuals shall be deemed to be a resident of the State in which its place of effective management is situated. A 'dual resident' individual is initially deemed to be a resident of the State in which he has a permanent home available to him. If he has a 'permanent home' in both States or in neither, he is deemed to be a resident of the State in which he has his 'centre of vital interests' (The State with which his personal and economic relations are closer). If the personal and economic relations of an individual are not closer to one State than to the other (say if the centre of vital interest cannot be determined), the individual is deemed to be a resident of the State in which he has an habitual abode. If he has such an abode in both States or in neither State, he is deemed to be a resident of the State of which he is a citizen.

If the individual is a citizen of both States or of neither, the competent authorities are to settle the States of the individual by mutual agreement.

3. Permanent Establishment

The existence of a 'Permanent Establishment' is a prequisite for one State to tax the business profits of resident of the other State. The concept is also significant in determining the applicability of other provisions of the agreement, such as articles on dividends, interest, royalties etc. The term 'permanent establishment' replaces the 'business connection' principle under the Income-tax Act, 1961.

The term 'permanent establishment' means fixed place of business through which a resident of one State engages in business activity. Illustrations of the concept; of a fixed place of business include a place of management; a branch, an office, a factory; a workshop; premises used as a sales outlet for receiving or soliciting orders; a mine, quarry or other place of extraction of natural resources; a building site or construction installation of assembly project or supervisory activities in connection therewith, where such site,

project or supervisory activity continues for a period of more than 3 months. The rule is a physical test under which the resident must be actively engaged in the project during that 3 month's period.

The article specifically provides that permanent establishment does not include a fixed place of business of an enterprise of a residence of one of the States which is located in the other State if it is used only for one of the following :

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise of the resident;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display or for processing by another enterprise;

(c) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information for the enterprise, or of advertising, for the supply of information or for scientific research being activities solely of a preparatory or auxiliary character in the trade or business of the enterprise;

(d) the maintenance of a building site or construction, installation or supervisory activity in connection therewith, where such site, project or supervisory activity continues for a period of less than three months.

The above exceptions are cumulative and a site or facility used solely for more than one of these purposes will not be considered a permanent establishment under the agreement. Thus a fixed place of business used solely for, or an employee engaged solely in, certain specified activities is not a permanent establishment. Unlike some of the other agreements combinations of the specified activities is not excluded from the purview. Except the activities of advertising, supply of information or for scientific research other activities need not be of a preparatory or auxiliary charcter in order to avoid the creation of a permanent establishment. The reference to specific activities does not imply that any other particular activities for example, the servicing of a patent or know-how contract or the inspection or the implementation of engineering plan do not fall within the scope of these activities provided that, based on the facts and circumstances, such activities have preparatory or auxiliary character.

The article also provides that notwithstanding the provisions described in the preceding paragraph if the following conditions are met, a resident of one State will have a permanent establishment in the other State even in the absence of a fixed place of business :

(a) If he engages in business through an agent, other than an independent agent, who has and regularly exercises authority to contracts in the name of such person unless the agent only exercises such authority to purchase goods or merchandise :

A principal could have an agent other than an independent agent in India. However, to avoid target of Indian revenue the agent should not be given authority to conclude contract on his principal's behalf. Further his activities should be limited to the purchase of goods in India.

(b) If he habitually maintains in the State, stock of goods or merchandise belong to the enterprise from which he regularly delivers goods or merchandise for or on behalf of the enterprises.

An Italian resident carrying on business in India through a broker, general commission agent or any other agent of independent status could avoid having a PE in India by acting in the ordinary course of his business.

The mere fact is that a company in India as a subsidiary or holding company of another company in Italy will not make either of them a PE of the other company.

4. Taxability of business profits

The taxation under the agreement differs from Indian tax rules for taxing business profits primarily by requiring something more than merely being engaged in trade or business (business connection), before a country can tax these profits and by substituting the 'attributable to' standard. Some of the agreement refers to a prior permanent establishment ('or has carried on'.) Absence of such reference makes it clear that a contracting state in which permanent establishment existed has no right to tax the business profits attributable to that permanent establishment.

The agreement provides that both the countries shall attribute to that permanent establishment business profits which the permanent establishment might be expected to make if it were a distinct and separate person engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with its home office. The agreement incorporates the provisions of OECD model convention that if it is customary in a state to determine the profits to be attributed to a permanent establishment on the basis of apportionment of the total profits of the enterprise to its various park the arm's, length eule shall be modified extent of customary practice. In addition, the agreement also provides that profits of a permanent establishment can also be estimated in a reasonable manner where the correct amount of profits attributable to a permanent establishment is incapable of determination or the ascertainment thereof present exceptional difficulties.

In determining business profits of a permanent establishment the enterprise is allowed deduction of those expenses which are incurred for the purposes of the permanent establishment including executive and administration expenses, whether incurred in the state in which the permanent establishment is situated or in any other state. However, nothing in the paragraph

requires India or Italy to allow a deduction for any expenditure which would not generally be allowed as a deduction under its taxation laws.

We have seen earlier that maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise for the enterprise shall not make it a permanent establishment. The agreement provides (that if a fixed place of business maintained partly for the purpose of purchasing goods or merchandise for the account of the enterprise and for other and partly with respect to other activities) no profits shall be attributed to a permanent establishment in its purchasing activities for the account of the enterprise.

The agreement further provides the relationship between the provisions of 'business profits, article and other provisions of the agreement. Where business profits include items of income which are dealt with separately in other articles of the agreement those other articles are controlling. However, as we will see later dividends (and interest and royalties) paid in respect of holdings forming part of the assets of a permanent establishment or fixed base or which are effectively connected with such permanent establishment or fixed base (i.e., dividends attributable to residents of the State in which permanent establishment or fixed base is situated.)

Lastly, it is provided that business profits are to be attributed to a permanent establishment by the same method in every taxable period unless there is good and sufficient reason to change such method.

5. Associated enterprise

To cover situations that are normally not covered by provisions in the domestic laws of the contracting states, the agreement provides determination of profits on arm's length basis of associated enterprises to reflect the conditions and arrangement which would have been between independent enterprises.

For the purpose of the agreement an enterprise of one country is related to an enterprise of the other country if one of the enterprises participates directly or indirectly in the management, control or capital of the other enterprise. The enterprises are also related if the same persons participate directly or indirectly in the management, control, or capital of both enterprises.

6. Air Transport

The provision of taxability of air transport income is mostly similar to the provisions under the old agreement of 1975. Income derived by an enterprise from the operation of aircraft in international traffic excluding internal traffic, shall be taxed only in the State of effective management of the enterprise. This gives complete exemption from taxation of aircraft profits in the source country.

The exemption applies even if the aircraft is not registered in either country. The provision also applies in respect of participation in profits of any kind.

A new provision has been added that interest on funds connected with such operations shall also be regarded as air transport income, thereby exempting such income. The definition of term 'operation of aircrafts' has been widened to include the incidental lease of aircraft in addition to business of transportation by air of persons, livestock, goods or mail, carried on by the owners or lessees or charterers of aircraft, including the sale of tickets for such transportation on behalf of other enterprise and any other activities directly connected with such transportation.

7. Shipping profits

The provision does not apply to profits arising as a result of coast traffic. This is on accountal of specific provision in the article and also because of definition of 'International traffic' which does not include operation solely between places in one of the contracting State. However, the provision covers profits derived from the rental on full or bare boat basis, i.e., whether the ships or aircraft are leased, fully equipped, manned and supplied or not provided such rental profits are incidental to the operation of ships. Profits derived from the use, maintenance rental of containers including trailers and related equipment for the transport of containers in connection with the transport of goods or merchandise is also covered.

Shipping income is to be taxed in both the States. But tax in the source State shall be reduced by 50 per cent. This liberalisation applies even if the ship is not registered in either country.

8. Dividends

The agreement allows both the States to impose tax on dividends paid by a company resident of a State to residents of other States.

In both Italy and India the same rates of tax are applied to residents and non-residents. Dividends, interest payments and royalties are subject to withholding tax, with obligations of reimbursement if such tax is levied on non-residents with no permanent establishment in Italy. In particular, dividends received by non-residents with no permanent establishment in Italy, are subject to withholding tax at a fixed rate of 30%; however, they are entitled to have up to two-thirds of this withholding tax credited against the tax actually paid abroad.

In India foreign companies receive a concessional tax treatment in respect of dividend, interest, royalty and technical service fees income. Dividends are taxed at the rate of 20 per cent.

The treaty does not make any difference between direct and portfolio investments. Considering the importance of entrepreneurial holding for a developing company concessional rate of tax for direct investment need to be provided in the Indo-Italian Treaty on the lines of similar incentives in our other treaties.

The agreement provides that the company resident of a State will not be

subjected to tax the source State on the dividends paid by the company or its undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State. However, the exception does not apply to dividends paid to a resident of the source State or if the owner of the shares carries business in the source State and the stock holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such a case, the dividends are taxable as business profits or income from independent personal services.

The agreement defines 'dividends' for the purpose of this article as income from different type of shares, as well as income from other corporate rights as per domestic law of this State. However, debt claims, participating in profits are not covered by the term.

French Treaty does not include any other item treated as dividend or a distribution of profits under that law. Since the interest and royalty articles do not confer the concessional rate of tax to non-arm's length interest and royalty. Both interest and royalty in excess of the limit would be treated as dividend. The definition of dividend under the treaty need to be broadened by mutual agreement so as to cover such excess deemed dividend.

9. Interest

As with 'dividends', interest in India or Italy and paid to a resident of the other State may be taxed in both the State, on a graded rate. In India rate of tax on interest paid to a foreign company is 25 per cent. In Italy interest paid to not residents is similarly subject ton withholding tax at 12.5 per cent which rises to 25 per cent for interest derived from bank and post office deposits and to 15 per cent for interest on bank acceptances.

Under the agreement tax in the source State on the interest paid to a resident of the other State in respect of loans or debts (in India, such loans or debts should be approved by the GOI), shall not exceed 15 pr cent of the gross amount of such interest. Even this limited tax in the source State shall be waived if

(a) the payer of the interest is the Government of local authority of that State;

(b) the payer is an agency or instrumentality or a financial institution if the contract is agreed upon by the two States.

It is also provided that neither the 15 per cent limitation on tax in the source State nor taxing the income as interest will apply if the recipient of interest, being a resident of a State, carries on business in the State of source through a permanent establishment or fixed base, and the debt claim in respect of which the interest is paid is effective connected with such permanent establishment or fixed base (i.e. the interest is attributable to the permanent establishment or fixed base). In this case, interest income is to be taxed

in the source State as business profits that is on a net basis according to its own law. We have seen that identification of source of interest is important, for the purposes of the article. Interest is considered to arise in contracting State if the payer is that State, a political or administrative sub-division, local authority or resident of that State. However, in cases where the person paying the interest, whether a resident of a contracting State or a third State, has in a State other than that of which he is a resident, a permanent establishment or fixed base in connection with which the indebtedness on which the interest was paid was incurred, and such interest is borne by the permanent establishment or fixed base, then such interest is deemed to arise in the State in which the permanent establishment or fixed base is situated and not in the State of the payer's residence. 'Borne by' means allowable as a deduction in computing taxable income. Thus, Indian tax will not be imposed on interest paid to an Italian resident by a company resident in India if the indebtedness is incurred in connection with and the interest is borne by a permanent establishment of the company situated in a third State.

The agreement further provides that the concessional rate of tax on interest does not apply to amounts (non-arm's length interest charges) in excess of the amount which would have been agreed upon between persons having no special relationship (arm's length). The excess amount remains taxable according to the laws of India and Italy, consistent with any relevant provisions of the agreement (i.e., excess interest paid to a parent corporation may be treated as a dividend under local law and, thus,entitled to the benefits of dividend article).

Indian law now exempts from tax payments of interest to foreign Governments and their agencies. The agreement does not guarantee that such exemption will continue. Like dividend, interest is defined as income from the Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and debt claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises.

The concessional/zero tax was to help in utilisation of credit lines in the 1985 inter-governmental agreement and contracts to be financed under the 'open' financial conventions signed between the Intito Bancario S laolo di Torino and the Indian banks and the Exim Bank of India.

10. Royalties

Like divided and interest, royalties are also taxed in both the States. Royalties means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literacy, artistic or scientific work including cinematograph films and films or tapes for radio or television broadcasting, any patent, trade mark, design or mode, plan, secret formula

or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.

Unlike interest there is no 'effectively connected principle' for royalties. However, there is a source rule for royalties, similar to interest. Italy and India also have similar source rules under respective domestic laws.

The provisions of article shall also not apply to non-arm's length payments.

The agreement, unlike interest does not limit rate of tax on royalties in the source State. This is a departure from our recent agreements both with developed and less developed countries particularly because of great stress on high technology import in India. In Italy royalties are subject to withholding tax on 30 per cent calculated on 70 per cent of the gross amount (effective rate 21 per cent) and in India foreign companies are subject to a tax at source at the rate of 30 per cent on the gross amount. In India, the resident companies are taxed at the rate of 50-55 per cent of the 50 per cent of the royalties, etc; received from foreign Governments/foreign enterprises (section 80-O of the Act). Both countries have protocol of understanding on Technical and Financing co-operation of 1991. This could be utilised for furthering transfer of technical know-how, by using concessional provision under the treaty.

In our recent treaties there is a special provision for taxation of Technical service fees consistent with the need to promote flow of technical personnel. Further there is concessional rate of tax on direct dividends, royalties and technical service fees like interest in this treaty. The present treaty need to be modified to cover these aspects.

11. Capital gains

It has been specifically provided that gains from the sale, exchange or transfer of a ship or aircraft operated by an enterprise of a contracting State be taxable only in the State in which place of effective management of the enterprise is situated. This is consistent with the provision for taxing aircraft profits in the States of residence and shipping profits at concessional rate in the State of source.

Gains from the sale, exchange or transfer of immovable property may be taxed in the State in which such property is situated immediately before such sale, exchange or transfer. This is on the lines of tax on income from immovable property. The definition of immovable property is same as discussed under the head 'Income from house property'. Similarly, gains from sale, exchange or transfer of any property, whether tangible may be taxed in the State in which such property is situated immediately before such sale, exchange or transfer. For the purpose of the agreement, the situs of shares in a company shall be in the State in which the company is incorporated. The provision is different than taxing of dividend income which is permitted in both States.

12. Elimination of double taxation

One of the two principal purposes for entering into an income-tax agreement is to limit double taxation of income earned by a resident of one of the countries that may be taxed by the other country. India seeks unilateral to mitigate double taxation by generally allowing Indian resident taxpayers relief of foreign income-taxes that they pay against the Indian tax imposed on their foreign source income. A fundamental premise of the foreign tax credit is that it may not offset the Indian tax on Indian source income.

Unilateral efforts to limit double taxation are imperfect. Because of differences in rules as to when a person may be taxed on business income, a business may be taxed on by two countries as if it were engaged in business in both countries. Also, a corporation or individual may be treated as a resident of more than one country and be taxed on a world-wide basis by both.

Paragraph I provides the general rule that will apply under the agreement with respect to foreign tax credits for Indian or Italian taxes paid or accrued. The article provides a detailed procedure for this purpose separately for India and Italy. Generally the method used is the credit method.

In respect of income from sources within Italy which has been subjected to tax both in India and Italy, the amount of Italian tax payable, under the laws of Italy, by resident of India, whether directly or by deduction, shall be allowed as a credit against the Indian tax payable in respect of such income.

The credit shall not exceed that proportion of the Indian tax which such income bears to the total income chargeable to Indian tax. If the resident of India is a company by which sur-tax is also payable, the credit to be allowed against Indian tax shall be allowed in the first instance against the Income-tax payable by the company in India and, as to the balance, against the sur-tax payable by it in India.

In the case of resident of Italy, if any item of income is taxable in India, Italy may first include such item of income on the basis upon which personal, corporation and local income-tax are imposed, unless there is a contrary provision in the agreement. After doing so, Italy shall deduct from the taxes so calculated the Indian tax on income, but an amount not exceeding that proportion of the aforesaid Indian tax which such items of income bear to the entire income. However, no deduction shall be granted if the item of income is subjected in Italy to a final withholding tax by request of the recipient of the said income in accordance with the Indian law.

Both countries are also to give credit of taxes spared or business profits, dividends, interest or royalties arising in a contracting State by exemption or reduction in accordance with the taxation law of that State. Thus, the treaty extends the double taxation relief even in respect of those specific

items of income which have been specifically exempted in India by deemed payment of tax on such income in India. Both States may apply exemption with progression for calculating the rate of tax to be imposed on the remaining income.

The items of income included in this provision are :-

(a) Business profits subject to tax by reason of their being attributable to the maintenance by a taxpayer of a permanent establishment;

(b) Income from immovable property;

(c) Salaries, pensions paid by either country or by any political or administrative subdivision who qualify for Governmental exemption and reside in the other country;

(d) Compensation for labour or personal services performed in either country and taxed by the other country in accordance with the dependent or independent personal services articles;

(e) any other business or personal service income which may be taxed in accordance with the agreement; and

(f) dividends, interest and royalties which are taxed by reason of the fact that these are effectively connected with a permanent establishment in either country maintained by a taxpayer of other country.

13. Mutual agreement procedure

The agreement contains the standard mutual agreement provision which authorises the competent authorities together to attempt to alleviate individual cases of double taxation not in accordance with the agreement. When a resident of one State considers that action of one or both States has resulted, or will possibly result, in taxation contrary to the provisions of the agreement, such resident may present his case to the competent authority of the State of which he is a resident within 2 years from the date of assessment or the date of the withholding of tax at source, whichever is late. This remedy is in addition to any remedy provided by the national laws of either State. Upon notification, the competent authority makes a determination as to whether the objection appears justified. If the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution then that competent authority would endeavour to resolve the case by mutual agreement with the competent authority of the other country, with a view to the avoidance of taxation which is not in accordance with the agreement.

The competent authorises of the two States are to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation and application of the agreement. They may also consult each other for the elimination of double taxation in cases not provided for in the agreement.

The agreement authorities the competent authorities to communicate with

each other directly for purpose of reaching an agreement in the sense of mutual agreement provision.

These provisions make clear that it is not necessary to go through standard diplomatic channels in order to discuss and also removes any doubt as to restrictions that otherwise arise by reason of the confidentiality rules of India or Italy.

The agreement does not list particular matters to which the competent authorities might agree. However, some of the matter of competent authorities would be authorised to agree, are the allocation of income, deduction credits or allowances, to the determination of the source of income, and to the common meaning of the terms.

The provision, however, does not authorise the imposition of additional taxes after the statutes of limitation have run out.

14. Exchange of Information

This article forms the basis for co-operation between the two countries in their attempts to deal with avoidance or evasion of their respective taxes and to enable them to obtain information so that they can properly administer the agreement. The agreement provides for the exchange of information which is necessary to carry out the provisions of the agreement. In addition, the agreement expressly authorises the exchange of such information as is necessary for the prevention of fraud or fiscal evasion. The exchange of information is not restricted by personal scope article. Therefore, the countries could exchange information about third country residents. The agreement requires exchange of information relevant to the taxes which are the subject of this agreement.

Any information exchanged is to be treated as secret in the same manner as information obtained under the domestic laws of the country receiving the information. Exchanged information is to be disclosed only to persons or authorities (include courts and administrative bodies) involved in the assessment or collection or, the enforcement, investigation or prosecution in respect of, or any fraud connected therewith, or to persons in respect with whom the information or document relates.

15. Conclusion

India accounts for a very small share of Italy's global trade. India and Italy have a joint business council (JBC). The council envisages doubling of the Indo-Italian trade within the next 3 years, by diversifying the trade composition.

The level of Italian investment in India and industrial collaboration between Indian and Italian companies, no doubt has improved, in the post liberalisation period, due to India emerging as an attractive investment destination, however, the position of Italy has declined from 5th in 1981-91 to 8th during 1992-94. Italy could increase its presence in India in the areas of textiles, ready-made garments, chemicals, leather, machine tools,

electronics, textile machinery and processed foods. Italian companies could use India as the base for manufacturing of sub-components and sub-assemblies for its industrial products and as a source country to manufacture goods with buy-back arrangements. These goods could be exported to Asian-Pacific region, which has proximity to India. Both could take up joint projects, particularly in the construction filed, in third countries (middle east and former Soviet Union). Italy's participation as a partner country in India Engineering trade fair would give a boost to these activities.

The present agreement notified in 1990 has been revised in 1993. The parliamentary procedure of ratification of the DTAA in Italy is pending before it comes into effect.

Special audit under proposed new section 14A of the Central Excise and Salt Act, 1944

By

K.K. Jhanwar

In the Budget for 1995-96 a number of changes have been proposed in various provisions of the Central Excise and Salt Act, 1944 which are to take effect from the date of the enactment of the Finance Act, 1995 that is the date on which the Finance Bill, 1995 receives the assent of President of India. One of the most important changes which has far reaching implications for the manufacturing sector and Cost Accountants, is the proposal to insert a new Section 14A in the Central Excise and Salt Act, 1944 regarding special audit in certain cases. The sub-section (1) of proposed Section 14A reads as under :-

> "14A. *Special audit in certain cases* : (1) If at any stage of enquiry, investigation or any other proceedings before him, any Central Excise Officer not below the rank of Assistant Commissioner of Central Excise, having regard to the nature and complexity of the case and the interest of revenue, is of the opinion that the value has not been correctly declared or determined by a manufacturer or any person, he may with the previous approval of the Chief Commissioner of Central Excise, direct such manufacturer or such person to get the accounts of his factory, office, depots, distributors or any other place, as may be specified by the said Central Excise Officer, audited by a cost accountant, nominated by the Chief Commissioner of Central Excise in this behalf."

Thus as per sub-section (1) of proposed Section 14A the Central Excise Officer not below the rank of an Assistant Commissioner of Central Excise will be empowered to order, with the previous approval of the Chief Commissioner of Central Excise (CCCE), for special audit of accounts of manufacturer or any person, pertaining to his factory, office, depots, distributors or any other place by a cost accountant to be nominated by the CCCE. The rationale for enacting this provision is to get the Assessee's records scrutinised by a professional person for determining the correct duty liability. This power which is exercisable by the Commissioner of Central Excise (CCE) or Assistant Commissioner of Central Excise (ACCE) with the previous approval of CCCE, is restricted to complicated cases where in the course of enquiry, investigation or any other proceedings before him he has reason to doubt the assessable value determined and declared by the manufacturer or any person. Thus this audit will not extend generally instead it can be ordered only in selective cases and that too with the previous approval of CCCE which would require a subjective discretion of CCE. This means that CCCE cannot be forced to give permission for Audit though CCE/ACCE may have reason to believe that audit is warranted having regard to the nature and complexity of the case and the interest of revenue where he is of the opinion that the value has not been correctly declared or determined by a manufacturer or any person. The requirement of prior permission of the CCCE has been kept presumably to ward off any possible misuse of power by the CCE/ACCE.

The coverage of this section is very wide as it extends to all category of persons whether corporate or not and whether manufacturer or not including offices, depot, distributors or any other place of manufacturer or any person. But unlike statutory audit under Section 224 of the Companies Act, 1956, cost audit u/s 233B of the Companies Act, 1956, Tax Audit u/s 44AB of the Income-tax Act, it cannot be called audit as such, because its application is susceptible to discretion of excise authorities not below the rank of ACCE. At best it should be called the investigation of books of accounts of the manufacturer or any person for limited purposes. However in the Headnote of the proposed Section 14A the words "Special Audit" have been used, which signify unqualified intention of our law makers to characterize it as a audit which is also reflected in sub-section (3) of the proposed Section 14A which states that the provisions of sub-section (1) shall have effect notwithstanding that the accounts of the manufacturer or person aforesaid have been audited under any other law for the time being in force or otherwise. Here words 'under any other law for the time in force' presumably indicate the Companies Act, Income-tax Act, Society Registration Act, *whereunder audits are required for various stated purposes.* Thus sub-section (3) of proposed section 14A give this audit an overriding character. This means side by side statutory audit, cost audit the manufacturing companies may also, if the circumstances as mentioned in proposed Section 14A(1) are there, may be required to undergo this special audit which may involve repetitive audit work. Sub-section (1) of Section 14A states that Central Excise Officer not below the rank of ACCE may direct the manufacturer or any person to get the accounts (emphasis supplied) of his factory, office, depot, distributors or any other place as may be specified by Central Excise Officer, audited by a Cost Accountant nominated by the CCCE in this behalf which indicates that a wide range of areas may be subjected to special audit. The use of word 'accounts' in this section is quite intriguing as in the Central Excise and Salt Act, 1944 the word accounts has not been defined. Whether it indicates cost accounts or it covers all accounts including financial accounts is not clear. In the absence of clarity the meaning of accounts as used in general parlance should be assumed. The word accounts in general commercial usage includes every conceivable accounting record including non-statutory accounting records kept by the manufacturer or any person for its internal control purpose. The idea behind including the depots, distributors under the ambit of proposed audit appears to be to check manipulation in pricing of the product to evade the duty. This has become more relevant when excise duty structure has become ad valorem i.e. the duty is payable on the price declared in the invoice.

The power to nominate the cost accountant has been clothed with CCCE. There appears to be some drafting error. Because apart from the words 'cost accountant', the words 'firm of cost accountants, should have also been included to give wide choice to CCE to select the persons/firm with adequate expertise depending upon the size of enterprise subjected to rigour of special audit. It has also not been specified how CCCE will select the cost accountant. The provisions could have been made to provide that cost accountant will be selected out of pool notified by Institute of Cost

and Works Accountants of India to ensure impartiality in the selection so as to avoid friction amongst fellow Cost Accountants over granting of the audit work. Sub-section (2) provides that the cost accountant so nominated shall within the period specified by Central Excise Officer submit a report of such audit duly signed and certified by him to the said Central Excise Officer mentioning such particulars as may be specified. Here it would have been better if uniform period of three months or six months could have been prescribed instead of vesting the discretion of fixing period with Central Excise Officer not below the rank of ACCE. Further the form of audit report should have been specified. The Government has option to prescribe elaborate procedure, nature and content of audit report by framing appropriate rules in Central Excise Rules, 1944 which will give clarity and transparency as to content and use of such audit report.

The discretion to fix the remuneration has been given to CCCE. Since all expenses incidental to audit including remuneration of the cost accountant is to be borne by the company it would have been appropriate if the remuneration would have been fixed with mutual consent of the CCCE and the Company. Further there should have also been provisions that if nothing consequential is found out against the Company the remuneration should be borne by the Central Government. This would have made the provisions more equitable. Sub-section (4) of proposed Section 14A provides that in case of default in payment of the remuneration, the same will be recoverable in the manner provided under Section 11 of the Central Excise and Salt Act, 1944 as if it were an arrear of land revenue. Already corporates are paying hefty amounts to their statutory auditor, cost auditor and this will be an added burden more particularly if ultimately nothing adverse is found against them.

Sub-section (5) of proposed Section 14A provides that the manufacturer or person shall be given an opportunity of being heard in respect of any material gathered on the basis of audit under Sub-section (1) and proposed to be utilised in any proceedings under this Act or rules made thereunder. This is an equitable provision and desirable on the ground of principle of natural justice.

The new provisions as contained in proposed Section 14A are welcome as they will help in checking evasion of excise duty under ad valorem duty structure regime and protect the revenue of the government with the help of professional cost accountants. The new provisions will also give added recognition to the profession of cost accountancy. But the government should ensure that provisions are made more clear, unambiguous and transparent.

Hope the government will try to impart more clarity and unambiguity in provisions while framing Central excise rules relevant to this Section by prescribing an elaborate procedure, nature, scope and content of audit report so as to achieve the objectives for which this new section 14A has been proposed.

MAGAZINE

Allowability of legal expenses in regard to writ petition against new imposts of Central Excise

By

N.S. Raghavan

Of late, a large number of new imposts under Central Excise are being levied. The tax payers have no other options but to take such imposts to litigation in the way of writ petitions. Though legal expenses incurred in filing writs are not allowable as business expenditure, legal expenses incurred in connection with writ petition filed against the new imposts of Central Excise are allowable based on the decision of the Supreme Court in C.I.T. vs. Malayalam Plantations Ltd., (1964) 53 ITR 140. The following article will be useful to tax payers to claim such expenses as business expenses.

General

1. One notices writs galore being filed by the Indian citizens to get their grievances redressed, as this is guaranteed under the Indian Constitution. The question is whether expenses, incurred in connection with writs filed by businessmen against new imposts of Central Excise can be entertained and allowed as part of the business expenditure. The tax payers have no option but to challenge such new imposts of Central Excise by way of writ petitions. The Income-tax department, however, does not allow the legal expenses incurred in connection with writ petitions filed against the new imposts of Central Excise as business expenditure. Though some Appellate Tribunals have allowed these expenses, the point has not been clearly established.

Case of the IT Department

2. It appears that legal expenses are incurred by the tax-payers in challenging the additional levy imposed by the Excise Act by the writ petition. According to the Income Tax department, the said legal expenses are not incidental to the assessee's business. It is not disputed that such amount has been incurred by the assessee. The department states that this is merely an additional charge on the existing rate which does not in any way hamper the normal functioning of the company.

Tax Payer's Contentions

3. The assessees have challenged the additional levy of excise duty which would enhance the price of commodity in question and, accordingly, the assessee has to face the competition in the market with a high cost product. It is immaterial whether such additional levy was imposed on all manufac-

turers of similar type of product as produced by the assessee. It cannot be said the expenditure in challenging such levy is not made on the grounds of commercial expediency and in order indirectly to facilitate the carrying on the business.

Supreme Court decision in Malayalam Plantations Ltd. (1964) 53 ITR 140

4. The Calcutta High Court has referred to the decision that laid down the principles in such cases in *Malayalam Plantations* (supra) case, as follows:

"In our view, the principles laid down by the Supreme Court in *CIT vs. Birla Cotton Spinning and Weaving Mills Ltd.* (1971) 82 ITR 166 will apply to the facts and circumstances of this case. Business expediency may not require that all expenses be incurred for earning immediate profits. Such expediency may also require that expenses be incurred to save business from coercive process and unlawful expropriation so that business may remain on sound footing and may earn greater profits in future. Where an assessee takes any steps for reducing its liability to tax which results in more funds being left for the purpose of carrying on the business or where the assessee takes steps for increasing the sale price for generating more funds for the purpose of carrying on business, there is always a possibility of higher profits. Accordingly, in determining whether an expenditure is deductible the essential test which has to be applied is whether the expenses were incurred for the preservation and protection of the assessee's business from any such process or proceedings which might have resulted in the reduction of its income and profits. In our view, legal expenses claimed by the assessee are allowable as business expenditure. Even otherwise, the expenditure was incidental to the business and was necessitated or justified by commercial expediency. Accordingly, the expenditure is deductible".

Calcutta High Court Decision

5. On similar point, the Calcutta High Court considered in *C.I.T. vs. Krishnan Gyanoday Sugar Ltd.* (1990) 186 ITC 541. There, the legal expenses were incurred by the assessee in connection with the writ petition filed in the Calcutta High Court challenging the Sugar Control Order and asking the High Court to give libery to the assesee to collect the excess price of sugar. The expenditure in question was incurred for pursuing the aforementioned writ petition. The Income tax Officer held that the expenditure in question could not be related to the earning of the income. There, the Commissioner of Income-tax (Appeals) reversed the above order of the Income-tax Officer observing that whatever might be the nature of earning, it was clear that the writ petition was filed in the interest of the business in getting a better sale price for the sugar and as such the expenditure was allowable as a proper business expenditure under section 37 of the Act. The Tribunal affirmed the order of the Commissioner of Income-tax (Appeals) by holding that it was only in the interest of the business that

the assessee has incurred the expenditure and, in this regard, the test laid down by the Supreme Court in the case of *CIT vs. Malayalam Plantations Ltd.* (1964) 53 ITR 140 has been followed. The High Court held that the test laid down by the Supreme Court in *Malayalam Plantations* (supra) case has been followed.

Conclusion

6. It is immaterial whether such additional levy was imposed on a manufacturers of similar type of the product as produced by the assessee. It cannot be said that expenditure in challenging such levy is not made on grounds of commercial expediency and in order indirectly to facilitate the carrying on the business. The tax payers, who have such a case can legitimately claim such expenses as business expenses.

Depreciation even without full-fledged ownership of assets

By

R. Santhanam

The question whether the depreciation allowance could be claimed or allowed in respect of depreciable assets for which the assessee is not a full-fledged owner, is an area of judicial controversy. The Allahabad and Patna High Courts have taken the view that the assessee who is having possession and use of the property for which consideration has been paid and in respect of which agreement to sell has been entered into, would be entitled to claim depreciation allowance as the owner of the property, whereas the Madras, Kerala, Delhi and Orissa High Courts have taken the contrary view to hold that no depreciation is admissible to an assessee who is not the full-fledged owner and in whose name, the property is not registered. All the above judgments, even though rendered after 1-4-1988, in some cases, have been based on the law as it stood prior to 1st April, 1988. In view of Section 2(47) of the Income-tax Act having been amended by the Finance Act, 1987, w.e.f. 1st April, 1988, the transfer of ownership for the purpose of income-tax must be regarded as having become complete even when there is no registration of the conveyance deed in favour of the assessee by the seller to the buyer. Therefore, the divergent judicial opinions of different High Courts based on the law which stood earlier, cannot directly be applied for the assessment year 1988-89 and subsequent years. Consequently, the benefit of depreciation allowance would be admissible to tax-payers even in cases where immovable property which, as depreciable asset, is not registered in the name of the buyer—assessee. The majority of rulings of the High Courts rendered earlier on the basis of the law prior to 1-4-1988 cannot, therefore, be applied in the same manner to cases involving assessment year 1988-89 and subsequent years. The learned author has analysed the law in this regard for the purpose of readers.

1. Introduction

The allowance of depreciation in computing the taxable profits of the business or profession under section 32 of the Income-tax Act is vital to arrive at the proper computation of income chargeable to tax. Section 32 stipulates that in order to be allowed depreciation it is essential that the depreciable asset must be owned by the assessee and that the asset must be used for the purpose of the business or profession. The taxpayers and

tax authorities invariably find it difficult to agree with one another in regard to the fulfilment of both these conditions which are cumulative in their application. The fulfilment of both the conditions being a prerequisite, the non-fulfilment of either of these conditions would disentitle the assessee to claim depreciation and would in turn empower the revenue authorities to disallow the claim and impose the levy of tax as if depreciation claim and disallowed as income chargeable to tax.

2. Legislative Amendment

This controversy has acquired a new dimension in regard to the scope of resolving the dispute in the appellate and judicial process after the legislative amendment of section 2(47) of the Income-tax Act made by the Finance Act, 1987 w.e.f. 1-4-1988. The effect of the amendment to section 2(47) is that the term 'transfer' in relation to a capital asset must be construed for the assessment year 1988-89 and for subsequent years to include any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882. As a result of this amendment the payment of consideration for and taking over possession of the immovable property coupled with entering into an agreement for sale and purchase of the property would be adequate so far as tax laws are concerned and it is not essential that the property must be registered by way of a conveyance deed being executed by the transferor in favour of the transferee.

3. Effect

Prior to this amendment the legal position was altogether different and only when the property is registered in the name of the transferee the transferee could claim to be the owner thereof and hence until conveyance deed was executed and registered the transferor was regarded as the owner and the transferee could not make such claim of ownership. Further, the transferor was denied depreciation as he did not use the property as depreciation asset for business or profession, carried on by him as the property has been handed over physically for being held and used by the transferee. In the hands of the transferee the depreciation is disallowed on the ground that he is not the owner although use of the property by him for business is not doubted.

As a result, both the transferor and the transferee are denied depreciation by the Revenue taking advantage of the situation arising from delays and difficulties in the matter of registration of the transfer by execution of conveyance deed. In all such cases, the disputes between the assessee and the revenue will require to be resolved first by ascertaining the assessment year to which the dispute relates because the change in law is effective only for and from the assessment year 1988-89. Further, the answer to the issue in dispute depends upon the question whether the transferor is

denied depreciation or the transferee is denied depreciation and, if so, in either case, which is the jurisdiction of the High Court under which the case of the assessee falls.

4. Importance of change in law

The divergence of judicial opinion on the one hand and change in law on the other would thus make it imperative for the decision making to be based on the law as applicable to the relevant assessment year. In most cases, the use of the depreciable asset for the purpose of being a matter of fact, would get dissolved at the stage of the Tribunal and a finding of fact in this regard would be rendered in the disposal of the appeal but the question as to ownership is a question of law and invariably a mixed question of law and facts and, therefore, the decision in respect of ownership would reach finality only when the reference taken against it is finally concluded by the decision of the High Court and thereafter by an appeal before the Supreme Court. Therefore, one has to be guided by the decision in appeal on the issue of dispute in regard to ownership as the criteria for granting or denying depreciation allowance and that too having regard to the assessment year to which the relevant provision as applicable is actually applied to arrive at a decision.

5. Judicial Analysis

The law is well settled that under the general law relating to transfer of property the ownership of an immovable property has to be determined only by seeing the documents of title to the property as evidence of ownership because it is the legal title that determines the entitlement to make the claim for depreciation and not mere possession and symbolic title. The law on the subject has been elaborately examined by the Madras High Court in *CIT vs. Tamil Nadu Agro-Industries Corporation Ltd.* (1987) Taxation 87(3)118 (Mad.), (1987) 163 ITR 61, in the light of the statutory provisions of the Income-tax Act, the Transfer of Property Act and Registration Act to hold that the ownership of depreciable asset referred to in section 32 of the I.T. Act is the legal title to the property and not the mere possession, use and enjoyment thereof. Accordingly, the assessee was held to be not entitled to depreciation allowance as it was not the owner having title to the property. In this case, the conveyance deed for sale of the property in favour of the assessee was executed on 22-3-1975 and it was registered subsequently, and therefore, for the assessment year 1973-74 which was the year in dispute the assessee was held to be not the owners of the property and hence not entitled to depreciation allowance merely on the ground of having used the property for the purpose of business carried on. The Court further held that the effect of registration under section 47 of the Registration Act read with section 17 thereof is to confer legal title to the transferee and hence the registration relates back to the date of execution of the conveyance deed and only on and from the sale deed being executed

ownership of property would vest in the transferee. This is also clear from the decisions in *Ramsaran Lal vs. M.S.T. Domini Kuer* AIR (1961) SC 1747 and *Hiralal Agarwal vs. Ram Padarath Singh* AIR (1969) SC 244. The view taken by the Madras High Court in the above case, is also in conformity with the judgments of the Supreme Court in *CIT vs. Bhurangya Coal Co.* (1958) 34 ITR 802 (SC) and *Alapati Venkatramaiya vs. CIT* (1965) 57 ITR 185 (SC) wherein the concept of effective transfer of immovable property has been explained.

The Bombay High Court in *Amarchand J. Aggarwal vs. Union of India* (1983) 142 ITR 402 and *Amarchand Jai Narain Agarwal vs. Union of India* (1983) 142 ITR 410 also examined the effect of registration of a document of title to immovable property in the context of proceedings for acquisition of immovable property under the Income-tax Act.

The Delhi High Court in *CIT vs. Hindustan Cold Storage & Refrigeration Pvt. Ltd.* (1976) 103 ITR 455 has also held that an agreement to sell without being followed by a deed of conveyance being executed and registered would not confer title on the buyer nor take away the title of the seller. To the same effect also the decisions of the Bombay High Court in *CIT vs. Sultan Bros. Pvt. Ltd.* (1983) 142 ITR 249 (Bom.) and *Dr. Raja Sir M.A. Muthiah Chettiar vs. CIT* (1984) 148 ITR 532 (Mad.).

The Calcutta High Court in *CIT vs. Ganga Properties Ltd.* (1970) 77 ITR 637 has also held that mere beneficial ownership of property by having an agreement to sell and by taking possession of the property on payment of consideration would not vest title to the property in the transferee to enable him to claim to be the owner thereof. The Full Bench of the Kerala High Court in *Parthas Trust vs. CIT* (1988) Taxation 89(3) 260 (Ker.), (1988) 169 ITR 334 has also examined the concept of ownership of immovable property in the light of English and Indian cases in relation to a property settled in trust and to determine the entitlement to claim depreciation in respect of assets used for the purpose of business. In this case, the assessee trust was found using the assets held in its possession for the purpose of business carried on by it but it was found to be not having legal title to the property settled in trust and hence the assessee not being the legal owner was held to be disentitled to claim depreciation. Mere beneficial interest in the property would not be adequate to claim the rights, title and claims as owner of the property and this was so held by the Supreme Court in *R.B. Jodhmal Kuthiala vs. CIT.* 1971 Taxation XXXI (1) 290 (SC), (1971) 82 ITR 570 (SC). Therefore, the ownership of property relevant for depreciation allowance is the legal ownership and not mere beneficial ownership.

6. Contrary Views

However, the Allahabad High Court in *Addl. CIT vs. U.P. State Agro-Industrial Corporation* (1981) 127 ITR 97 took the view that for the

purpose of depreciation allowance under section 32 of the IT Act it is enough if the person claiming to be the owner is in a position to exercise the rights of ownership not on behalf of the person in whom the title vests but in his own right and that the transfer of possession by the State Government in favour of U.P. State Agro-Industrial Corporation was adequate to enable the Corporation to claim depreciation allowance notwithstanding the fact that no sale deed had been executed and registered in its favour. This is also because of the fact that the title of U.P. State Agro-Industrial Corporation was neither questioned nor likely to be questioned by the State Government of U.P. and no one else could have any rival claim as for all practical purposes the State Government and the State Industrial Corporation are one and the same or at best two sides of the same coin.

In *Addl. CIT vs. Sohay Properties & Investment Co. Pvt. Ltd.* (1983) Taxation 70(3)102 (Pat.), (1983) 144 ITR 357 the Patna High Court took the view that ownership need not in every case be determined from the document of title in the hands of the assessee in his own name but could be inferred from the assessee's right to exclude others from claiming any right, title or interest in the property. So long as the assessee has everything which will signify ownership short of title and can use that right even for enforcing specific performance of the contract to have the property registered in his name. The ownership of the assessee to the property cannot be disputed and hence, the assessee should be regarded as the owner to allow depreciation.

7. Latest decision and dissent

The Orissa High Court in *CIT vs. Draupati Pvt. Ltd.* (1995) 211 ITR 593 and the Madras High Court in *Tamil Nadu Agro-Industries Corporation* as well as the Kerala High Court in the case of *Parthas Trust* have expressly dissented from the above views of the Allahabad and Patna High Courts.

8. Suggestions and conclusion

The result of the concept of ownership being decided differently by different High Courts for the purpose of depreciation would require to be kept in mind because in all the above cases, the assessment years in dispute were prior to 1-4-1988 and hence, the view expressed in all the above cases, prior to 1-4-1988 would not apply or prevail for assessment year 1988-89 and subsequent year because of the legislative amendment to section 2 (47) effective from 1-4-1988 made by the Finance Act, 1987. Further, even for the earlier assessment year what was held by the Allahabad & Patna High Courts would continue to prevail within the jurisdiction of those High Courts as both these decisions have not been reversed or overruled so far.

Moreover, the controversy in regard to legal and beneficial ownership is no more applicable or relevant for the assessment year 1988-89 and

subsequent years and therefore, reliance on the judgments of *Parthas Trust* and of *Tamil Nadu Agro-Industries Corporation* as well as other decisions of the Supreme Court on which reliance was placed to arrive at a judgment in these cases would not disentitle the assessee to claim depreciation because the distinction between legal and beneficial ownership is inapplicable from assessment year 1988-89. What is most important is the use of which depreciable asset is put by the person claiming to be the owner thereof.

So long as the claimant is having possession, use and enjoyment of the property whose case falls under section 53A of the Transfer of Property Act, the claimant would qualify for depreciation allowance and the same cannot be denied. It cannot be said that the amendment to section 2(47) is only for the limited purposes of capital gains tax and not for grant of depreciation allowance because the criteria followed for determining transfer and ownership of capital asset is the criteria adopted even for computing depreciation allowance admissible to the assessee and two are therefore inseparable.

In view of what is stated above, the claims for depreciation should be allowed for and from assessment year 1988-89 without unduly stressing on the requirement of legal ownership by the assessee.

Tax Reliefs for Education

By

S.P. Pahwa

Education can go a long way in shaping the economy and behaviour pattern of any country. Rather education itself is capable of solving many problems. However, even educated persons sometimes behave in a manner not expected of them. Without multiplying the examples, the main issue was tax incentive for education - education of all. Inspite of the tax incentives, the rate of literacy has not come up to the desired level in India. Accordingly, Shri S.P. Pahwa, Ex. IRS, after referring to the various provisions of Tax Laws and some of the case law, has suggested for a detailed study of the subject, more tax incentives, provision of 'free education' to the deserving including higher education etc. If we have good intelligentia in India, why the VIPs would rush to foreign countries for education, treatments for ailment and other matters.

Education for all had been the recent slogan and the Bhartiya Janata Party heading the Delhi Government (National Capital) had to come up with 'human chain' - bringing the awareness for all that 'Education' is must for all. What is education for this purpose is that the basic/primary education should be available to all including the illiterate adults. This is the reason we had adult educational centre for teaching in the evening. Still something more is needed on the part of the Central Government, State Governments and other voluntary educational organisations including some of the charitable institutions concerned with education.

2. Be that as it may, India has lagged behind in achieving the desired goal for education - in some of the corners of India, literacy rate is still at the lowest ebb. The magnitude of uneducated children and rate of illiteracy is well known. However, from the Hindustan Times dated 9th Feb. 1995, where position of educating the children and aged (specially between the age group of 15-35) was highlighted under the heading 'Towards total literacy.' Still, this effort of the NDMC and Delhi Government are not sufficient unless some steps on the positive side are taken including involvement of more voluntary organisations and setting up of more centres.

3. With this general picture of 'education', we come to tax incentives. Some already exist. At the outset, a reference is made to the provisions of section 2(11) of the Income-tax Act, 1961 defining 'charitable purpose' which includes 'education'. In other words, charitable institutions involved in educational activities i.e. establishment of schools, colleges etc. would be getting exemption as per provisions of the section 11 but in view of various

practical problems, only few organisations come with actual teaching centres - the practical problems being including lack of land, other infra-structure etc. Hence so many institutions just remain on 'paper' without achieving the cherished objects of the person behind the show. At the same time, once a society is formed or an institution is established, no body would like to leave the authority - rather they should get disassociated themselves in the course of time once the institution gets dedicated to 'public'. Actually, the Government has no machinery to take over such institutions and that is why discrimination of 'Public', 'Private' and 'Government' schools continue to exist after many years of independence. All this speaks of lack of good and practical 'Education Policy' and the needed tax incentives for the growth of literacy.

4. After a society is registered and also gets its registration under section 12A of the Income-tax Act, 1961, it gets the certificate under section 80G for raising donations and these donations get exempted/or get tax relief in the hands of donors. Actually, it has been seen that the certificate under section 80G is a cash certificate and only few well established institutions maintain proper accounts and do their activities to achieve the objects including establishment of schools/colleges etc. Some persons form their own societies to get tax relief for their relations and then with the passage of time, the so-formed institutions die their own death. Hence the need to exercise more checks so that the funds raised are actually spent for the purposes for which they are meant. Even in the case of blind schools, it is noted that more than 50% is spent on administrative matters and a little reaches the needy.

5. Under the provisions of section 10(22) of the Income-tax Act, 1961, complete exemption from income-tax has been granted to any income of a university or other educational institution, existing solely for educational purposes and not for purposes of profit. The bare expression 'other educational institution' has created lot of litigation and on a plain reading, even an institution owned by a private person is entitled to get this exemption if it is proved that the institution is existing only for 'educational purposes' and not 'for purposes of profit'. The expression 'for purposes of profit' had also been the bone of contention leading to closing of some institutions on account of tax liability. This section need to have a fresh legislative look so that the education is properly spread for which the exemption was given. In view of two independent provisions, i.e. sections 11 and 10(22), persons claiming exemption under section 11 have to undergo various and manifold formalities to continue as a charitable institution with 'education' as one of the purpose. Whereas exemption under section 10(22) is a blank exemption, the institution may or may not file its return of income. Actually, the Law does not oblige such persons to file their returns of income. For achieving the intention of this section, some procedural matters need to be carved out specially for 'other educational institutions'.

6. The Finance Act, 1994 made another attempt to allow deduction in respect of repayment of loan taken for higher education. The amount of loan had been limited to Rs. 25,000/- and the expression 'higher education' has been defined to mean full-time studies for any graduate or post-graduate or post-graduate course in engineering, medicine, management or for post-graduate courses in applied sciences or pure sciences including mathematics and statistics. Loans are to be allowed by approved charitable institutions/ financial institutions. Be that as it may, the amount of Rs. 25,000/- is insignificant to complete any of the courses mentioned above. Rather, higher education should be free to certain deserving persons (whose parents cannot afford) and they are interested in pursuing their studies.

7. Another anomaly exists under the Gift-tax Act, 1958. This provision i.e. section 5(1)(xii) gives exemption in respect of gifts for the education of children, to the extent to which the gifts are proved to the satisfaction of the Assessing Officer as being reasonable have regard to the circumstances of the case. This is a liberal provision but the judgment and 'discretion' would and is bound to vary from person to person - whether he is a claimant or the Assessing Officer. Even this liberal and straight provision had been made subject matter of litigation. The question of gift-tax exemption for education of children had come up before the Bombay High Court in the case of *K.M. Sheth vs. Commissioner of Gift-tax* (1988) Taxation 89(3) 356 (Bom.), (1988) 170 ITR 407 where the assessee had settled on trust certain shares for the benefit of his minor son including for educational expenses. The assessee claimed exemption under section 5(1)(xii) of the Gift-tax Act but was denied as the settlement was not for 'education' only but was for number of purposes including food, clothing, residence etc. Now, if a child is put in the boarding, 'education' has to include such incidentals. Maybe the settlement was part of tax planning on the part of the assessee, accordingly, the Bombay High Court held that no portion of the gift was in fact for the education of the minor son. Accordingly, the settlement was not covered by the provisions of section 5(1)(xii) of the Gift-tax Act, 1958.

8. Distinguishing the ratio laid down by the Honourable Bombay High Court (supra) the Madras High Court held in the case of *Commissioner of Gift-tax vs. P.C. Varghese* (1994, 121 Taxation 475) that the gift for education of children is exempt. In this case the assessee had set apart estimated expenditure of Rs. 48,000/- for the son for school/college education and Rs. 55,600/- for the education of two daughters. The Tribunal allowed the exemption under section 5(1)(xii) to the extent of Rs. 1,12,178/-. The Madras High agreed with the Tribunal and held that the amount was really set apart to meet the education of the children and there was nothing wrong in it.

9. Keeping in view the present trend of growing education, what is needed is to accelerate its speed from various angles including more tax incentives and their real utilisation for education.

Important Changes brought out by Finance Bill, 1995

By

O.C. Tandon

Before the budget was out there was speculation as to changes likely to be brought by the Finance Bill. In fact many eminent economists came out with their forecasts as to the changes likely to be introduced in the Finance Bill but for a few forecasts all turned out to be off the mark. In fact Finance Bill, 1995 does not bring out many changes in the Income-tax Act but there are certain changes which are not highlighted but have been made casting more responsibility on the tax-payers. Some of the important changes are given below :-

(i) **Rate of tax** —But for the increase in the limit in the taxable income from Rs. 35,000/- to Rs. 40,000/- in the case of individuals, there are no other changes. With the increase in limit and slabs remaining the same, there is an overall benefit of Rs. 1,000/- in tax to all the tax-payers. There are no changes in the slabs or slab rates of tax structure.

(ii) **Changes in Section 2 of the Income-tax Act** — Under the existing provisions "short term capital asset" means a capital asset held by an assessee for 36 months or less excepting in the case of shares in a company or other securities listed in the recognised stock exchange or unit of the Unit Trust of India or a unit of the Mutual Fund. These are treated as short term capital asset if these are held by the assessee for 12 months or less. The proposed amendment now seeks to specify that in the case of a capital asset being a share, security or unit which is allotted without any payment on the basis of holding of any other financial asset, the period for treating such share, security or unit as a short term capital asset shall be calculated from the date of allotment of such share etc.

(iii) **Amendment to Section 10 of the Income-tax Act**

Clause (10D) of Section 10 has been amended. In view of introduction of a new section 80DDA to provide that any sum received under sub-section (3) of Section 80DDA, namely, the amount deposited by the individual or a member of the HUF for payment of annuity or lump sum amount for the benefit of handicap dependent if received by such individual in the event of handicap dependent pre-deceasing such individual or member of the HUF, the amount received by him shall not be exempt from tax.

Section 10(14) as already existing provides exemption in respect of such allowance or benefit which are specified by a notification. Since it is difficult to keep track of the notifications, the words "as may be prescribed under Income-tax Rules, 1962" have been substituted. This will obviate the difficulty of going through all the notifications since the rule as amended from time to time may be referred to.

Clause (15) of Section 10 has been amended. Sub-clause (v) of Clause (15) in order to enlarge the scope of income-tax exemption by providing such exemption also on interest on deposits for the benefit of the victims of Bhopal gas like deposits held in such account, with the RBI or with the Public Sector Bank as the Central Government may by notification in the official gazette specify in this behalf. Such notification can be made prospectively or retrospectively but not from a date earlier than 1-4-1994.

Sub-clause (iv) of Clause (15A) has been amended. The proposed amendment seeks to restrict the scope of the exemption by excluding therefrom payments made for providing spares, facilities or services in connection with the operation of the leased aircraft. After clause (23AA) of section 10, a new clause (23AAA) has been inserted. This clause has been inserted so as to provide for exemption from income-tax on any income received by any person on behalf of a fund established for such purposes as may be notified by the Board, for the welfare of the employees or their dependents and of which fund such employees are also members. This exemption will be available only if fund applies its income or accumulates it for application, wholly and exclusively for the objects for which it is established. Such fund has to invest its funds and contributions of the employees or other sums received by it in any one or more forms or modes specified in Section 11(5). Further such fund has to be approved by the Commissioner of Income-tax in accordance with the rules made in this behalf and such exemption shall be valid for such assessment year or years not exceeding three assessment years as may be specified in the year of approval.

Clause (23D) of Section 10 has also been amended. Under the existing provisions of clause (23D) any income of a mutual fund set up by a public sector bank or a public financial institution or authorised by the Securities & Exchange Board of India or the RBI, is exempt from income-tax only if it is specified for the purpose of this clause by the Central Govt. by notification in the official gazette. The proposed amendment now seeks to provide that the requirement of specification by the Central Govt. will not apply in the case of a mutual fund registered under the Securities & Exchange Board of India Act, 1992 or the regulation made thereunder.

After clause (23E) of section 10, a new clause (23F) has been added. This clause has been inserted to provide income-tax exemption on any income by way of dividends or long term capital gains of a venture capital fund or a venture capital company from investments made by way of equity shares in a venture capital undertaking. In order to obtain exemption, the venture capital fund or venture capital company will require approval by the prescribed authority in accordance with the rules made in this behalf and satisfy the prescribed conditions. Such approval by the prescribed authority will at any one time, have effect for such assessment year or years, not exceeding three assessment years, as may be mentioned in the order of approval.

If the aforesaid equity shares are transferred (other than in the event of listing of shares in a recognised stock exchange in India) by a venture capital fund or a venture capital company at any time within a period of three years from the date of their acquisition, the aggregate amount of income by way of dividends on such equity shares which has not been included in the total income of the previous year or years preceding the previous year in which such transfer took place, shall be deemed to be the income of venture fund/venture company of such previous year in which the transfer took place. The exemption also will not be allowed in respect of long term capital gains, if any, arising on the aforesaid transfer of equity shares.

In this sub-clause, venture capital fund, venture capital company, venture capital undertaking have also been defined. These definitions are not being reproduced.

After clause (25) of Section 10, a new clause (25A) has been added. This addition has been made to provide income-tax exemption of any income of the employees state insurance fund and the employees state insurance corporation set up under the provisions of Employees State Insurance Act, 1948.

After clause (26B), a new clause (26BB) has been added. This clause provides income-tax exemption on any income of a corporation established by the Central Govt. or any State Govt. for promoting the interests of members of such minority communities as may be notified from time to time.

(iv) **Amendment to Section 10A** — After sub-clause (i) of sub-section (2) of section 10A, a new clause (ia) has been added. This amendment has been made to provide that where an undertaking begins to manufacture or produce any article or thing on or after 1-4-1995, benefit under the said section shall be available only if the exports by the undertaking was not less than 75% of the total sales during the previous year.

(v) **Amendment to Section 17** — Sub-section (3) of Section 17 defines profits in lieu of salaries. It is an inclusive definition. In clause (ii) of sub-section (3) of section 17, after the word clause (12), "clause (13)" has been added. This amendment has been made to exclude from the definition of profit in lieu of salary the payments which are covered under clause (13) of section 10 and not any other payments from the superannuation fund. The idea is to confine the exemption to the income as specified in clause (13) of section 10 only.

(vi) **Amendment to Section 32** : This amedment is in regard to deduction in respect of depreciation on building, machinery, plant or furnishers owned by the assessee and used for the purpose of business or profession. In the provisions as existing, first proviso to sub-section (1) of Section 32 allows full deduction in respect of items of machinery or plant where the value does not exceed Rs. 5,000/- in the previous year in which it is first put

to use. In view of the introduction of granting depreciation in respect of block of assets, even such items of machinery will form a part of the block of assets and will be eligible for depreciation in accordance with rule 5 of the Income-tax Rules, 1962 and it is thus proposed to disallow separate deduction in regard to such assets.

(vii) **Amendment to Section 33AC :** Under the section as existing at present 100% deduction is provided in respect of amounts carried out to a reserve account by a Government company or public company formed and registered in India with the main object of carrying on the business of operation of ships. With the present amendment, the amount of deduction is restricted to 50% of the income derived from the business of operation of ships only. This amendment, therefore, takes out the scope of this section income arising from other business or falling under other heads of income.

(viii) **Amendment to Section 35CCA** — Under the existing provisions sums paid by an assessee carrying on business or profession to any association or institution, which has its object, the undertaking of programme of rural development are allowed as a deduction in computing the taxable income. A new clause has been added so as to provide a deduction in respect of expenditure by way of payment to the national urban poverty eradication fund set up and notified by the Central Government while computing income from profits and gains of business or profession chargeable to tax.

(ix) **Amendment to Section 36** — Clause (viii) of sub-section (1) of section 36 provides that an approved financial corporation engaged in providing long term finance for industrial or agricultural development in India or an approved public company having main object of carrying on business of providing long term finance for construction or purchase of residential houses, is entitled to a deduction of 40% of its total income. This clause has been amended so as to allow deduction to an approved financial corporation which provide long term finance for development of infrastructure facilities. This new amendment further restricts the deduction to only 40% of the profit derived from the business of long term financing only and as such takes outside its scope, the income arising from other business or falling under other heads of income.

(x) **Amendment to Section 40A** — Under the existing provisions cash payments in excess of Rs. 10,000/- are disallowed unless the payment is covered in one of the circumstances laid down in the rule 6DD. It has now been provided that any cash payment exceeding Rs 10,000/- will be disallowed to the extent of 20% of such expenditure.

(xi) **Amendment to Section 43(3)** — Sub-section (3) of Section 43 provides the definition of plant. According to the proposed amendment it excludes from the definition of plant tea bushes and live stock.

(xii) **Amendment to Section 44AB** — Under the existing provisions every

person where the total sales turnover exceeds Rs. 10 lakhs is required to get the accounts audited before a specified date. With the proposed amendment, the formality of getting the accounts audited within the specified date remains but it also lays down that such report has to be filed with the Assessing Officer before the specified date. The whole idea of the amendment is to see that it is no longer necessary that the report should accompany the return, even though the return being filed late, the report has to be filed within the specified date.

(xiii) **Amendment to Section 55** — Sub-section (2) of this section defines the cost of acquisition. With the amendment proposed where the assessee becomes entitled to bonus shares of any security which is received without any payment, the cost of such asset shall be taken to be nil. It would be seen that this amendment settles the controversy as to how the cost of bonus shares is to be worked out.

(xiv) **Insertion of new Section 80DDA** — This amendment provides for deduction of an amount not exceeding Rs. 20,000/- in a year made in accordance with any scheme of L.I.C. or U.T.I. for maintenance of a handicapped dependent after the death of the person maintaining such handicapped dependent. This concession is available both to individuals and HUFs. In case the handicapped dependent pre-deceased the assessee, the amount received by the assessee after the death of such dependent shall become taxable as income of the year in which the amount is received by the assessee.

(xv) **Amendment to section 80G** —This section is being suitably amended to provide 100% deduction in respect of donations made to Zila Saksharta Samitis constituted under the Chairmanship of Collector for the purpose of improvement of primary education, illiteracy and post literacy efforts in villages and towns with a population not exceeding one lakh. Further under the existing provisions, it is also proposed to allow deduction of 50% of the donation subject to overall limit of 10% of the gross total income of the assessee to corporation referred to in clause (26BB) of Section 10.

(xvi) **Section 80GGA** — This section has also been amended to allow deduction in respect of any sum paid by the assessee to National Urban Poverty Eradication Fund set up and notified by the Government.

(xvii) **Amendment to Section 80HHE** — Under the existing section by virtue of proviso to sub-section (1), no deduction is allowable in relation to profit from export of computer software in respect of assessment year commencing on 1-4-1996. By omitting this proviso, the benefit of deduction is extended for A.Y. 1996-97 and subsequent years.

(xviii) **Amendment to Section 80IA** — This amendment has been made mainly to provide 100% deduction from profits and gains of an enterprise carrying on the business of development, maintenance and operation of

infrastructure facilities for an initial period of 5 years and thereafter 30%. This deduction will be available if the enterprise (a) is owned by a company or a consortium of companies registered in India and (b) enters into an agreement with Central or State Govt. etc. for development, maintenance and operation of a new infrastructure facility, (c) transfer such infrastructure facility after a period stipulated in the agreement to such Government or authority or body concerned (d) starts operating and maintaining of the infrastructure facility on or after 1st April, 1995. This amendment also lays down that deduction will be available if the enterprise fulfills certain conditions. The existing concession of deduction of 25% (30% to companies) has been extended to small scale undertaking if such undertaking begins to manufacture or produce articles or things during the period beginning on 1-4-1995 and ending on 31-3-2000. Similarly, some deduction is also allowed to small scale undertakings to be established in industrially backward districts.

(xix) **Exemption u/s 80L** — Exemption under this section has been increased from Rs. 10,000/- to Rs. 13,000/-.

(xx) **Section 80U** — This section has been changed to raise the deduction allowable to handicapped persons from Rs. 20,000/- to Rs. 40,000/-.

(xxi) **Amendment to Section 88** — The benefit of rebate on premiums paid to LIC ss restricted to 10% of the actual capital sum assured. This limit of 10% has been removed. Further in single premium policy if surrendered within two years, the amount of deduction of income-tax allowable earlier shall be deemed to be tax payable in the year of surrender.

(xxii) **Amendment to Section 112** — The concessional rate of taxes on long term capital gains arising to a venture capital company from transfer of equity shares of venture capital undertaking has been omitted.

(xxiii) **Section 113** — This section was omitted by taxed Finance Act, 1995. A new section 113 is being inserted. This amendment has been made with the purpose that the undisclosed income of the block period in search and seizure cases is under new chapter XIVB. Now being inserted shall be taxed at a flat rate of 60%.

(xxiv) **Section 115K** — This section is applicable to small businessmen. This section has been amended by raising the limit from Rs. 42,000/- to Rs. 47,000/- and also to raise the qualifying turnover from Rs. 5 lakhs to Rs. 6 lakhs .

(xxv) **Amendment to Section 132** — According to the proposed amendment, proceedings under sub-section (5) of Section 132 will no longer be necessary as a result of search initiated or requisition made after 1-7-1995.

(xxvi) **Amendment to Section 133** — Under the existing provisions, the prescribed authorities have the power to call for any information from any person which will be useful for or relevant to any proceedings under the

Act. The amendment proposed to be made seeks to empower the prescribed authorities to call for information for the purpose of any inquiry under this Act even in cases where no proceedings are pending. However, if any authority below the rank of Director or Commissioner of Income-tax wants to exercise this power it can only be done with the prior approval of Director or CIT, as the case may be.

(xxvii) **Amendment to Section 133A** — Section 133A relates to the powers of the Income-tax authorities regarding survey. The proposed amendment seeks to provide that an income-tax authority having jurisdiction over an area assigned to him or in respect of any place occupied by any person in respect of whom he exercises jurisdiction may authorise any other income-tax authority to exercise the power of survey. The definition of Income-tax Authority has been enlarged by including therein, Director, Commissioner of Income-tax and Deputy Director.

(xxviii) **Amendment to Section 139** — According to the existing provision, a report u/s 44AB has to be enclosed alongwith the return. According to the amendment sought to be made it provides that an assessee engaged in any business or profession required to furnish either the report of any audit obtained u/s 44AB or where the report has been furnished prior to the furnishing of the return, attach a copy of such report with the return of income together with the proof of furnishing the report. Further, a return of income shall be regarded as defective if the report of any audit obtained u/s 44AB or where such report has been furnished prior to the furnishing of the return, a copy of such report alongwith the proof of furnishing the report does not accompany the copy of the return of income.

(xxix) **Substitution of new section 139A in place of old section** — According to the new section proposed to be inserted every person if his total income assessable during the previous year exceeds the maximum amount which is not chargeable to tax or any person carrying on business or profession whose total sales, turnover or gross receipts are or is likely to exceed Rs. 50,000/- in any year and he has not been allotted any Permanent Account Number is obliged to obtain Permanent Account Number within the prescribed time. This also provides that a person who is required to furnish a return of income under sub-section (4A) of Section 139 is also required to obtain Permanent Account Number. Apart from this, the Assessing Officer is also entitled to allot Permanent Account Number to any person by whom tax is payable.

This section gives enabling power to the Board for switching over new series of Permanent Account Number. For such purpose the Board may issue notification of the places to be covered from time to time and the class of persons to be covered etc.

This section also provides that it shall be the duty of every person who

has been allotted a Permanent Account Number to quote the same in all his returns or correspondence, challans and other documents pertaining to such transactions as may be prescribed by the Board in the interest of revenue. The amendment further seeks to provide that every person receiving any document relating to the prescribed transactions shall ensure that the Permanent Account Number has been duly quoted in the document. The Board is empowered to make rules in relation to the form and the manner in which the application for allotment of Permanent Account Number is to be made and prescribe the particulars of such application and the categories of documents, transactions pertaining to business or profession in which permanent account numbers shall have to be quoted by every person.

(xxx) **Introduction of new section 145** — In place of old section 145, a new section has been introduced. By introduction of sub-clause (2) of Section 145, the Central Government has reserved the right to notify in the Official Gazette from time to time accounting standards to be followed by any class of assessee or in respect of any class of income. According to the existing provisions the income has to be computed in accordance with the method of accounting regularly employed by the assessee. The substituted section provides that the income chargeable under the head "profits and gains of business and "profession" or "on the income from other sources" shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

(xxxi) **Chapter XIVB** — A new Chapter XIVB has been introduced which lays down special procedure for assessment of search cases. It was noticed by the Govt. that normally the completion of assessment in search case took unduly long time. The new procedure is to make the procedure of search and seizure cases effective. Under the new provisions the undisclosed income deducted as a result of search initiated by requisition made after 30-6-1995 shall be assessed separately as income of a block of 10 previous years. Where the previous year has not ended or the due date for filing a return of income for any previous year has not expired, the income recorded on or before the date of search or requisition in the books of accounts or other documents maintained in the regular course relating to such previous years will not be included in that block. The salient features of the proposed Chapter are as under :-

(a) The total undisclosed income of a person shall be assessed as the income of a block period consisting of ten previous years prior to the previous year in which the search was conducted or requisition was made and also the period of the current previous year upto the date of search or the requisition;

(b) The undisclosed income ~~of~~ the block period shall be taxed at a flat rate of 60%, specified in section 113 proposed to be inserted vide

clause 24 of the Bill. No penalty u/s 271(1)(c), 271A, 271B or 273 or interest u/ss 234A, 234B or 234C will be levied or imposed;

(c) The order of assessment for the block period shall be passed within one year from the end of the month in which the last authorisation for the search or requisition was executed;

(d) The order of assessment shall be passed by an Assessing Officer not below the rank of Assistant Commissioner of Income-tax with the previous approval of the Commissioner;

(e) Proceedings u/s 132(5) will no longer be necessary for searches initiated after 30-6-1995;

(f) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period, computed in accordance with the provisions of Chapter IV on the basis of evidence found as a result of search or requisition and such other inquiries as the Assessing Officer may make and such other material or information as are available with him, as reduced by the aggregate of the total income, or as increased by the aggregate of the losses, of such previous years; determined :-

(i) where assessments u/s 143 or 144 or 147 have been concluded, on the basis of such assessments and where income is determined under sub-section (1) or sub-section (1B) of section 143 on the basis of such determination;

(ii) where returns of income have been filed u/s 139 or section 147 but assessments have not been made till the date of search or requisition, on the basis of the incomes disclosed in such returns of income;

(iii) where the due date for filing a return of income has expired but no return of income has been filed, as nil;

(iv) where the previous year has not ended or the date of filing the return of income u/s 139(1) for any previous year has not expired, on the basis of income or the transactions relating to such income as are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years;

(v) where an order of settlement has been made, on the basis of such order;

(vi) where undisclosed income has been determined in any earlier block assessment, on the basis of such assessment;

(g) Provisions of sections 68, 69, 69A, 69B and 69C shall, as far as

may be, apply in computing the undisclosed income for the block period;

(h) The total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation u/s 32;

(i) In determination of undisclosed income in the case of a firm or its partner, the method of computation of undisclosed income and its allocation to the partners will be the method adopted for determining the assessed income or returned income for each of the previous year falling within the block period;

(j) The onus of proving to the satisfaction of the Assessing Officer that any undisclosed income referred to above has already been disclosed in any return of income filed by the assessee before the date of search will be on the assessee;

(k) Brought forward losses or unabsorbed depreciation will be allowed to be carried forward for set off in regular assessments and will not be set off against the undisclosed income determined in the block assessment;

(l) The Assessing Officer may serve a notice to such person requiring him to furnish within fifteen days, a return in the prescribed form and verified in the same manner as a return under clause (i) of sub-section (1) of section 142, setting forth his total income for the block period. No notice u/s 148 is required to be issued for proceedings under this Chapter.

(m) The Assessing Officer shall proceed to determine the undisclosed income of the block period, and the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 will, so far as may be, apply;

(n) The Assessing Officer, on determination of the undisclosed income of the block period, will issue an order of assessment and determine the tax payable by him on the basis of such assessment;

(o) The assets seized under sub-section (1) of section 132 or requisitioned u/s 132A will be retained to the extent necessary and will be dealt with in the manner laid down in section 132B;

(p) Where the Assessing Officer finds that any undisclosed income belongs to any person other than the person in whose case the search was conducted, the Assessing Officer having jurisdiction over such other person will proceed against him in accordance with the provisions of this chapter;

(q) Except as otherwise provided in this Chapter, all other provisions of the Income-tax Act will apply for assessments made under this Chapter.

This new procedure for search or requisition cases is proposed to be made effective in respect of searches initiated or requisition made on or after the 1st July, 1995.

(xxxii) Amendment to Section 194A : regarding deduction of tax at source

The salient features are -

(a) Deduction of tax from payment of interest of more than Rs. 10,000 in any financial year on time deposits made on or after 1-7-1995 with bank, a cooperative society. The limit of Rs. 10,000/- shall be computed with reference to the income credited or paid by a branch of the bank. This limit will not be applicable to interest on time deposit made with primary agricultural society or a primary credit society or a Cooperative Land Mortgage Bank or a Cooperative Land Development Bank;

(b) Section 194C has been amended to deduct at source from payments to contractors and sub-contractors. These provisions will now also be applicable to a firm. The term contractor and sub-contractor will include professionals, broadcasting and telecasting including production of programme for such broadcasting or telecasting;

(c) Carriage of goods and passengers by any mode of transport other than railways;

(d) Catering;

(e) According to the amendment effected in section 194-I, rate of tax for deduction at source in the case of rental payments has been reduced from 20 to 15% in the case of individuals and HUF. There is no change in respect of other class of assessees.

(f) A new section 194-J has been introduced to provide deduction of tax at source at the rate of 10% to fees paid for professionals or technical services exceeding Rs. 20,000/-. Only assessees other than individuals and HUF making such payment will be required to deduct tax;

(g) A new section 194-K has been introduced to provide for deduction of income-tax at source at the rate of 20% in the case of a domestic company and 15% in the case of other residents from payments made exceeding Rs. 10,000/- in respect of units or mutual funds. The said limit of Rs. 10,000/- shall be computed with reference to the income credited or paid in respect of branch office of mutual

fund or UTI. Further the said limit shall be computed w.r.t. the income credited or paid under a particular scheme;

(h) Section 196A has been substituted. The new section provides for deduction of income-tax at the rate of 20% in the case of a non-resident not being a company or a foreign company from payments of income in respect of units of mutual fund or the UTI. No deduction shall, however, be made from income payable in respect of units in the case of non-resident individual or HUF where the units have been acquired out of funds in a non-resident (external account).

Section 230A - This section has been amended to provide that no tax clearance certificate will be required where the value of property to be registered is less than Rs. 5 lakhs.

Sections 245C & 245D - These sections have been amended in regard to settlement of cases before the Settlement Commission. No application for settlement can be made unless the additional amount of income-tax payable on the income disclosed in the application exceeds Rs. one lakh. Similarly by amending provisio to sub-section (1) of section 245D the period within which the CIT shall furnish report has been reduced from 120 days to 45 days from the date of receipt of communication from the Settlement Commission.

Section 269-UC - An amendment has been proposed in section 269-UC relating to restriction on transfer of immovable property. At present the limit of Rs. 10 lakhs is applicable. But by this amendment powers have been given to the Board to prescribe different value for different areas. Further power has been vested with the Appropriate Authority to ask the assessee to rectify defects in the statement and the time taken by the party filing the revised statement shall also increase the time limit of the Appropriate Authority in granting permission on order the purchase of property. If the defect is not rectified, it will be considered as if the statement was never filed.

Section 271B - Section 271B relating to levy of penalty for failure to get accounts audited has been amended. The proposed amendment seeks to provide that failure to furnish the report of any audit as required u/s 44AB, shall be treated as a default attracting penalty under the provisions of Section 271B.

The above are the important amendments proposed in the Finance Bill. It may be mentioned that some of the amendments have far reaching effect inasmuch as they throw heavy burden on the assessees for voluntary compliance. For example, the audit report has now to be filed within the specified date to avoid penalty proceedings. The pevious judgments that if the audit report has been obtained within the specified date and accompanies the return no penalty will be levied have since been overruled by this

amendment. Similarly for cash payments assessees used to take advantage that the party is identifiable and admits having received the payment, or insisted on cash payments etc. also will not be of much use. The amendments to Section 40A empowers straightway disallowance of 20% of such expenses. The importance of rule 6DD has thus been curtailed. Again a new section 113 has been added which provides that the undisclosed income seized during the course of search and seizure shall now be assessed in a block of years and the benefit of any loss already determined or carry forward loss or carry forward depreciation, etc. will no longer be available. The power of survey of the officers have been increased since under the Act as it exists today the power of survey is confined to the area within the limits of the officers but now with prior permission even areas outside jurisdiction could also be surveyed. Under the Act as it exists the power to call for information is available when any proceedings are pending and not for the purpose of fishing inquiries. Now authorities have been prescribed to call for information for the purpose of any inquiry under the Act and thus it is not necessary that when the officer is seized with the assessment, the power u/s 133 can be exercised. Similarly powers and the obligations to have PAN have been enhanced. Govt. has taken the power to prescribe for transactions where PAN must be mentioned. The whole idea of this amendment seems to be that some times people make investments which on later inquries either the persons are not traceable or the person who ultimately got benefit of the transaction is not traceable. Once the Govt. has taken the power that in certain transactions to be notified from time to time the PAN must be mentioned, it is easier to trace the identity of the person and may even help the department in detecting concealment by use of computers. The most dangerous, and if I may say with respect uncalled for amendment, is of abolishing the "Hybrid" system of accounting. This system of accounting has been recognised by law and by various courts including the Apex court to be a valid system and in fact if this system is not recognised, a businessman may face great difficulty. The powers of businessman to adopt cash basis or mercantile basis only is to deprive him of his fundamental rights. There is bound to be some agitation on this issue and if this amendment is carried through, may not be sustained in courts. On the other hand some amendment are welcome. Search and seizure cases used to take a long time to be finalized. The application of a flat rate of 60% to the block bringing the whole concealed income to tax and abolishing of levy of penalties and abolishing different types of interests should be a welcome amendment. Altnough the real effect of this would have to be judged by actual practice but since the permission of higher authorities has to be obtained it limits the powers of the Assessing Officer. The period of limitation of one year should however be a welcome suggestion. The amendments in regard to deduction of tax at source are really harsh. Income of a large number of processionals, interest payments etc. have been brought

under this net. If we look at these amendments very closely, there will hardly be any transaction which may not warrant deduction of tax at source and may lead to lot of litigation. Another important amendment is regarding powers of Appropriate Authority. According to the latest judgments, the Appropriate Authority had only two powers, viz either to issue no objection certificate, or to acquire the property. They have now been given the power even to file form 37-I as infructuous if the defects pointed out by them are not removed within a specified period. Of course the issue of raising limit of the value of properties to which the acquisition proceedings will be applicable has been far over due but still the power has been reserved by the Govt. which will be exercised by issue of notifications from time to time for different areas. In the case of notifications, sometimes it becomes very difficult to trace the same after a lapse of certain period. It would have been better if the powers would have been incorporated in the rules itself since amendment to rules can be easily traced compared to notifications.

MAGAZINE

Prima facie adjustment u/s 143(1)(a) - Can it be made after service of notice u/s 143(2) ?

By

K.R. Gupta

The new procedure of assessment, which came into force w.e.f. 1-4-1989, enables the Assessing Officer to process return of income by making certain prima facie adjustments u/s 143(1)(a) and levy additional tax of 20 per cent in respect of such adjustments. This procedure has been devised with a view to dispense with the requirement of passing an assessment order in all cases. In this article, the author who is an ex-Member, Central Board of Direct Taxes and practising as a Tax Consultant, has discussed the issue as to whether the Assessing Officer can make prima facie adjustments and levy additional tax of 20 per cent in a case where he has already issued notice u/s 143(2) for making a regular assessment. After referring to a recent decision of the Calcutta High Court and a Tribunal's decision on the subject, he has concluded that such additional tax cannot be levied where a case has been selected for scrutiny and notice u/s 143 has been issued.

Section 143(1)(a) of the Income-tax Act, 1961 provides that where a return has been filed under section 139 or under section 142(1), if any tax or interest is found due on the basis of such return, an intimation shall be sent to the assessee specifying the sum so payable and such intimation shall be deemed to be a notice of demand issued u/s 156. Similarly, if any refund is due on the basis of such return it shall be granted to the assessee. A proviso to the above enables the Department to make the following adjustments to the returned income or loss for purposes of computing tax or interest payable by or refundable to the assessee :-

(a) rectification of any arithmetical errors in the return or in the accompanying accounts or documents;

(b) allowance of any loss carried forward, deduction or relief, which on the basis of the information available in such return or the accompanying accounts or documents, is *prima facie* admissible but which is not claimed in the return;

(c) disallowance of any loss carried forward, deduction or relief, which, on the basis of the information available in such return, accounts or documents is *prima facie* inadmissible.

2. Sub-section (1A) of section 143 provides for the levy of additional tax of 20 per cent where, in the case of any person, the total income, as a result of the adjustments made under the aforesaid proviso, exceeds the total income declared in the return. The purpose of this levy is to persuade the tax payers to file their returns of income correctly and not to return lesser income by making obvious mistakes or by claiming obviously incorrect deductions.

3. Sub-sections (2) & (3) of section 143 enable the Department to make a regular assessment in a case which is picked up for security. Sub-section (2) provides that when the Assessing Officer considers it necessary or expedient to verify the correctness or completeness of the return to ensure that the income has not been under-stated, or the loss declared is not excessive, or the tax has not been under-paid, he shall serve on the assessee a notice to attend his office or to produce any evidence on which the assessee may rely in support of his return. Sub-section (3) provides that after hearing and taking into account all relevant material which the Assessing Officer has gathered, he shall pass an assessment order in writing determining the total income and the tax payable by the assessee.

4. It may be mentioned that notice u/s 143(2) can be served on the assessee only within a period of 12 months from the end of the month in which the return is furnished. On the other hand, intimation for any tax or interest due u/s 143(1)(a) can be sent within a period of two years from the end of the assessment year in which the income was first assessable. In this connection an issue that arises for consideration is whether the Assessing officer can make *prima facie* adjustments u/s 143(1)(a) and levy additional tax of 20 per cent in a case where he has already served notice u/s 143(2) for making a regular assessment.

5. On this issue, the view of the Department has been that since the word "shall" has been used in connection with the issuance of an intimation u/s 143(1)(a), the processing of return u/s 143(1)(a) is compulsory and, therefore, even though a notice u/s 143(2) has been issued, an intimation u/s 143(1)(a) can be sent after processing the return by making *prima facie* adjustments.

6. However, the above view of the Department has not been accepted by the Calcutta High Court in a recent case of *Modern Fibotex India Ltd. vs. Dy. CIT* (1995) 212 ITR 496. In this case, the assessee company exported certain goods. For the assessment year 1989-90, the company received cash compensatory support amounting to Rs. 7,99,144/- from the Government. The company filed its return for the assessment year in question claiming that the amount received by it on account of cash compensatory support was not taxable. Subsequent to the company submitting its return, the Finance Act, 1990 was enacted by which the provisions of section 28 were amended w.e.f. 1-4-1967 making cash compensatory

support taxable. On 22-6-1990 the Assessing Officer issued notice u/s 143(2) to the company for the assessment year 1989-90. On 31-7-1990 the Assessing Officer sent an intimation to the company u/s 143(1)(a) recomputing the loss shown by the company in the return on the basis of the amended provisions of section 28 of the Act and levying additional tax. The company filed applications under sections 154 & 264 which are rejected. On a writ petition against these orders and the order of intimation u/s 143(1)(a), the Calcutta High Court held that the impugned adjustments were *ultra vires* the section and were liable to be set aside. The Court observed that the return of income when filed could not be termed an incorrect one, as the change in the law by the amendment of section 28 took place several months after the return was filed by the assessee. The assessee's return could have been taken up by the Assessing Officer under section 143 prior to the amendment and in that event, no adjustment would have been made and no intimation would have been sent. The Court further observed that notice u/s 143(2) had been issued in this case prior to the intimation u/s 143(1)(a) and once the notice u/s 143(2) has been issued, there is no scope for the authorities either to make *prima facie* adjustment on the basis of the return as filed or issue an intimation u/s 143(1)(a). The Court pointed out that the language of section 143(1)(a) plainly says that an intimation can be issued without prejudice to section 143(2) but not that a notice u/s 143(2) can be issued without prejudice to section 143(1)(a). The omission by the Legislature to make the issuance of a notice u/s 143(2) without prejudice to an intimation u/s 143(1)(a) while specifically providing that the issuance of an intimation u/s 143(1)(a) would be without prejudice to section 143(2) was deliberate because of the difference in the nature of jurisdictions exercised by he Assessing Officer under the two sections. The jurisdiction u/s 143(1)(a) is a summary one whereas section 143(2) precedes an assessment u/s 143(3). Dealing with the Department's submission that the issuance of an intimation is compulsory, the Court observed as under :-

> "The respondent's submission that the issuance of an intimation is compulsory is incorrect. To accept the submission would be to read the provisions of section 143(1)(a) in a manner not warranted by the language. It is true that the word "shall" has been used in connection with the issuance of an intimation but it is well-established that the construction of the expression "shall" depends upon the provisions of the Act, the setting in which the direction is given and the consequences that would follow from the infringement of the direction and other such considerations. (See *CIT vs. Rai Bahadur Bissesswarlal Motilal Malwasie Trust* (1992) 195 ITR 825 (Cal.). The context in which the word "shall" has been used in section 143(2) has to be read in the background of the proviso to the section and that is where there is no scope for any adjustments in terms of the proviso, there would be no scope for sending any intimation.

Once having found the return not immediately determinable or summarily, the Assessing Officer cannot discard this view and determine the matter under section 143(1)(a) without there being any change in law or fact between the issuance of the notice under section 143(2) and the adjustment under section 143(1)(a)."

7. In the case of *Kerala State Coir Corporation Ltd. vs. DCIT* (1994) 50 ITD 1, the Cochin Bench of the Income-tax Appellate Tribunal also has taken the same view as expressed by the Calcutta High Court in the same view as expressed by the Calcutta High Court in the above-mentioned case. In this case, for the assessment year 1990-91, the assessee filed its return showing loss. In arriving at the figure of loss, the assessee, instead of taking the amount of allowable depreciation, had inadvertently taken the figure of the written down value of assets as depreciation. The Assessing Officer accepted the said figure as returned and sent an intimation dated 24-10-1991 u/s 143(1)(a). Later, on 28-10-1991, he issued notice u/s 143(2). Meanwhile, he also issued a notice dated 3-3-1993 u/s 154 for rectification of the aforesaid mistake. On 6-3-1993, assessment u/s 143(3) was completed adopting correct figure of depreciation. The Assessing Officer also passed an order u/s 154 dated 10-3-1993 whereby he withdrew the excess depreciation allowed in the intimation sent to the assessee u/s 143(1)(a) and levied additional tax. On appeal, the Tribunal held that on both the occasions, when the Assessing Officer sent intimation u/s 143(1)(a) or at the time when he passed the rectification order u/s 154, there was no scope for levy of additional tax, as the provisions of section 143(1)(a), as they stood then, did not envisage levy of additional tax in cases where the assessee's figure of loss was reduced but not converted into a figure of income, and the amended provision, which was given retrospective effect w.e.f. 1-4-1989 by the Finance Act, 1989, received the assent of the President of India only on 13-5-1993. As the amended provision was not in existence on 10-3-1993 when the Assessing Officer passed the rectification order, the Tribunal held that there was no mistake apparent from record and deleted the levy of additional tax. While holding this, the Tribunal also examined the effect of issue of notice u/s 143(2) and held that once u/s 143(2) was issued, the regular assessment proceedings get started and thereafter the Assessing Officer is not empowered to have or continue to have the preliminary proceedings u/s 143(1)(a). The Tribunal observed that "to be more explicit, a valid initiated assessment proceeding u/s 143(2) will prevail and supersede the provisions of section 143(1)(a). This view of ours is strengthened from the fact that any tax paid u/s 143(1)(a) is deemed to be tax paid under the regular assessment and any excess refund given under section 143(1) is deemed as tax payable on regular assessment."

8. Thus, as per the decisions of the Calcutta High Court and the Income-tax Appellate Tribunal, where in the case of an assessee a notice u/s 143 (2) has been issued, the Assessing Officer cannot process the return and

make *prima facie* adjustments u/s 143(1)(a) and levy additional tax in respect of such adjustments. The underlying object behind the provisions of the present sub-section (1)(a) of section 143 is to dispense with the requirement of passing an assessment order in all cases and, for this purpose, a summary procedure has been provided for sending an intimation, if any tax or interest is found due after making *prima facie* adjustments to the returned income. If the Assessing Officer has selected a case for scrutiny and issued notice u/s 143(2) for the purpose of making a regular assessment, he cannot fall back on the summary procedure of processing the return and sending an intimation u/s 143(1)(a). It is no doubt true that in respect of *prima facie* adjustments made to the returned income under the proviso to section 143(1)(a) the assessee is liable to pay additional tax of 20% and such additional tax cannot be levied in a regular assessment made u/s 143(3). However, for additions & disallowances made in a regular assessment, for which no additional tax has been charged under sub-section (1) of section 143, the assessee is liable to levy of penalty u/s 271(1)(c) read with *Explanation* 6 and the quantum of such penalty cannot be less than the amount of the tax payable. Therefore, from the point of revenue also, where a case has been selected for scrutiny and notice u/s 143(2) has been issued no purpose is served by processing the return and sending an intimation u/s 143(1)(a).

9. Conclusion

Where a case has been selected for scrutiny and a notice u/s 143(2) issued, the Assessing Officer is not competent to make *prima facie* adjustments and process the return u/s 143(1)(a) and levy additional tax in respect of such adjustments.

Recovery of demand - Interest under section 220 of the Income-tax Act, 1961 - Whether relatable to the original demand notice

By

S.P. Pahwa

It has been noticed that even levy of interest under section 220 for delayed and postponed tax liability has been a point of litigation. The majority of judicial opinion is that the levy of interest has to relate to the original notice of demand. Actually, the point comes out when the tax payer is burdened with tax liability retrospectively after appeals. Some of the tax experts hold the view that the interest should be charged on the basis of fresh and revised notice of demand. The article of Shri S.P. Pahwa Ex. IRS and Corporate Tax Planner highlighting the point at issue would prove educative and beneficial.

As is known to all that section 220(2) of the Income-tax Act, 1961 refers to the charging of interest on the sum specified in the notice of demand issued by the Assessing Officer under section 156 of the said Act. The notice of demand apparently means the notice of demand issued in pursuance of an assessment order creating the income-tax liability (demand). Under the proviso to the said section 220(2) refers to reduction of demand in appellate proceedings.

2. The short question for consideration is whether the levy of interest was valid on the basis of the original notice of demand on finality of proceedings i.e. after reliefs etc. allowed by the appellate authorities say, the Commissioner of Income-tax (Appeals) and/or the Appellate Tribunal.

3. Interest is payable as compensation towards deprivation of the benefit of money which lawfully belongs to a person or authority. The income-tax is certainly an amount which lawfully belongs to the State. If the payment is delayed or postponed for any reason, there can be not doubt that the Government (State) is being deprived of the amount which lawfully belong to the State. Actually, this is the background from which the position of payment of interest under section 220 is to be considered.

4. Actually even before the demand of income-tax is quantified, the liability to pay income-tax becomes a debt due on the last date of the accounting period. Therefore, from the scheme of the Income-tax Act, jurisprudentially, the income-tax department becomes a creditor and the tax-payer fall in the category of 'debtor'. Accordingly, the law laid down in the said section 220 contemplates that the debtor should compensate the creditor by paying interest on the amount due. Here it becomes important to point that the fact that the law postpones the discharge of the tax liability to the date

of issuance of a demand notice and the period of 30 days would not alter the nature of the tax liability.

5. We have another provision regarding non-payment of the tax dues i.e. the penalty under section 221. A comparison of sections 220(2) and 221 would show that the quality of the levy under section 220(2) is compensatory in nature as against the penalty contemplated by the provisions of section 221. However for the purposes of present discussion, we shall restrict to the provisions of section 220.

6. While discussing the payment of interest on the delayed payments and on-account of orders passed by the appellate authorities, the principles of merger cannot be ignored. An initial order of assessment gets effaced by the appellate or revisional order and only effective order is the ultimate order of the superior authority. This ultimate order of the appellate authority relates back to the original order, as otherwise, the very concept of having hierarchy of appellate and revisional forums will be defeated.

7. In the case of *Bharat Commerce and Industries Ltd. vs. Union of India* (1991) 101 Taxation 265; (1991) 188 ITR 277 the Delhi High Court had held that the first notice of demand issued after the original assessment order was passed by the Income-tax Officer could not be deemed to have been extinguished by virtue of the appeal having been filed before the Commissioner or the conditional stay of the operation of the assessment having been allowed by the Commissioner (Appeals), pending disposal of the appeal before him or by virtue of the subsequent reduction of the taxable income. It was further pointed out that under the order of the Appellate Tribunal which had attained finality. Further, the Bench pointed out that the levy of interest on delayed payment of tax is not to penalise the party but to make a provision for compensating the Revenue on the failure of the assessee to make payment as per the first demand notice.

8. On the facts of the case itself, the Kerala High Court held in the case of *A.V. Thomas and Co. Ltd. vs. Income-tax Officer* (1982, 138 ITR 275) that the liability to pay interest to the department under section 220(2) arises only from the date when the fresh notice of demand is issued to the assessee and not from the date when the tax was refunded to the assessee. In this case the tax computed by the Income-tax Officer was paid in full and within time and as a result of computation, a portion of the tax was refunded to the assessee. But, the Appellate Tribunal reversed the order of the Appellate Assistant Commissioner and restored the order of the ITO. Thereafter a fresh notice was issued calling upon the assessee to pay back the tax refunded to the assessee.

9. The above decision of the Kerala High Court (para 8 supra) was affirmed by the Division Bench in *A.V. Thomas'* case (1986, 160 ITR 818). However, in another case the Honourable Kerala High Court held in the case of *K.P. Abdul Kareem Hajee vs. Income-tax Officer* (1983, 141 ITR 120) that

the assessment order which was modified or reversed by the appellate authority which in turn was reversed by the Appellate Tribunal revives the original assessment order and therefore the liability for interest under section 220(2) gets attracted from the date of the original demand.

10. The Delhi High Court dissented from the ratio laid down by the Kerala High Court in *A. V. Thomas'* case (1986, 160 ITR 818 (supra)) and following its decision in the case of *Bharat Commerce and Industries Ltd.* (supra), it held that having regard to the nature and quality of interest leviable under section 220(2), the claim of the Revenue has to be upheld. It was observed that section 3(2) of the Taxation Laws and Validity of Recovery Proceedings Act, 1964, kept alive the earlier demand notice and treated the same demand notice as having been kept alive all along if ultimately the assessment order was upheld by the higher authority—the levy of interest under section 220(2) was valid and the ultimate order relates back to the original order.

11. Logic alone will not be determinative of a controversy arising from a taxing statute. The provisions of a taxing statute have to be read and understood according to the language of the statute and if the plain language compels the court to adopt and approach different from that dictated by any rule of logic the court may have to adopt it. Normally, unless it is shown that the context calls for a different meaning to be given to the term used in the same section, one would be justified in assuming that the term has been used so as to have the same meaning. Expressing this view, the Gujarat High Court (Full Bench) held in the case of *Bardolia Textile Mills vs. ITO* (1985) Taxation 76(1) 19 (1985, 151 ITR 389) that interest on the excess of advance tax refunded under section 214(1) has to be paid upto the date of 'regular assessment'. When the first assessment is final, that is 'regular assessment' for purposes of the Income-tax Act, 1961. Even when on an appeal, the Appellate Assistant Commissioner (now Deputy Commissioner (Appeals) etc.) he does not set aside the assessment but merely reduces the tax liability and the interest is payable on such excess tax paid upto the date of such revised assessment i.e. after appeal effects.

12. Same logic should hold good for the interest under section 220 but there has been little difference of opinion even on this small issue. Of course depending on the facts of particular case, the interest payable or recoverable has to relate to the original assessment i.e. original notice of demand. Even in the latest case of *Roopali Dyeing and Printing Works vs. Assistant Commissioner of Income-tax* (1995) Taxation 124 — page 264, (1995, 212 ITR 573) the Gujarat High Court held that the notice of demand must relate back to the original notice of demand. On the basis of the original notice of demand on finality of proceedings, the levy of interest was held valid. Taxpayers may keep this in mind that the interest would be payable from the original notice of demand and should be careful while withholding the taxes due.

How to avoid payment of interest for late filing of the Income-tax return ?

By

C.B. Rathi

Payment of tax is by no means a pleasure. We are however dutybound to pay the tax and any attempt to evade their payment is not only bad citizenship but even punishable under the law. Payment of interest for various delays or defaults is however neither wisdom nor good citizenship. Actually the purpose of these interests (or penalties) is to discourage assessees from committing those defaults which give rise to these levies. It is therefore not only the right but also a duty of the assessees to arrange their affairs in such a manner so as to avoid payment of these interests. This article deals with the interest for late filing of the return how it is computed, and how it can be avoided.

Section 234A provides for levy of interest for defaults in furnishing the return of income. The purpose of this section is to discourage assessees from committing delays in the furnishing of their return of income beyond the due date. This section therefore provides that interest will be levied on assessees who commit such delay and furnish the return after the due date. Interest is leviable for the period of the delay beyond the due date and till the date of furnishing the return. In cases where the assessee does not file the return and the assessment has therefore to be framed under section 144, the period of delay is to be computed till the date of such assessment. The rate interest is two percent for every month of delay. Part of a month is to be taken as a full month for computation of the period of delay. For example, a delay of 3 months and six days will be counted as a delay of 4 months.

The interest is to be calculated on the amount of tax on the assessed income, as reduced by the advance tax already paid and the amount of tax, if any, deducted at source.

In view of the above it follows that an assessee who wants to avoid payment of interest under section 234A, has to ensure that he furnishes the return of income before the expiry of the due date. Sec. 139 lays down the due dates for furnishing the return of income as under -

(i) in the case of Companies - 30th November of the assessment year,

(ii) in the case of other assessees who are required to get their accounts audited - 31st Oct. of the assessment year.

(iii) in the case of assessees carrying on any business or profession and who are not required to get their accounts audited - 31st August of the assessment year.

(iv) all other assessees - 30th June of the assessment year.

The assessee has to therefore carefully find out the 'due date' by which the return of income has to be submitted, and thereafter has to take all possible steps to furnish the return before the expiry of that date. In the case of salaried employees, and other assessee deriving income from sources other than business or profession the due date is 30th June. It means that they get full 3 moths for collecting the various details and papers required for filing the return. They should be able to furnish the return well before the due date if they start collecting the required papers soon after the close of the financial year. There should normally be no difficulty for them in furnishing the return of income before 30th June and they should be able to easily avoid payment of interest under sec. 234A.

Assessee who are carrying on any business or profession have to ensure that their accounts are finalised soon after the close of the Financial Year. Necessary steps will have to be initiated for this purpose even before the end of the financial year. Preparation of stock list and its valuation takes time and depending upon the quantity and the nature of the items in the stock, sufficient time will have to be ear-marked for this work. Reconciliation of the Bank accounts should be undertaken will in time after getting the passbooks updated. Similarly, tallying of the accounts of various customers, particularly the bigger ones should be taken up without loss of time. If the work of closing the accounts and preparing the Profit and Loss account and the Balance Sheet is undertaken well in time, it should not be difficult to meet the dead-line for filing the return of income. It is true that with the growth in the size of business and its area, preparation of the final accounts takes time, but it is also a fact that with the modern aids available for this work particularly the computerization of the accounts, this work can be done much faster now. In case where the accounts are required to be audited, the same will have to be submitted to the Auditors promptly. Parellel audit is recommended in the cases of big businesses. In short main need is for the assessee to remember the due date for the submission of the return and to initiate all possible steps well in time for this purpose. It should then be possible for the assessee to meet the requirements of the Act and avoid the liability to pay interest under Section 234A.

There may however still the cases where things may go out of hand and the return may not be read by the due date. Something unexpected or unforeseen may happen in the assessee's office itself and the work of preparing the final accounts may be thrown out of gear. Then the Auditor may not be able to complete his work in time. However *bonafide* the reasons for the delay, the I.T. Act now does not excuse it and interest under Sec. 234A is leviable irrespective of the reasons for the delay. Previously when penalty under Section 271(1)(a) was leviable for such delays in the filing of the return, the Act provided that penalty will not be levied in cases where the delay was for a reasonable cause. Sec. 234A does not leave any choice in the matter. Interest has to be levied if there is delay in the filing of the

return whatever may be reason for the delay. Proper safe-guard has therefore to be taken by all assessees to avoid the levy of interest, as delays in the filing of the return may occur inspite of all possible precautions taken to avoid such delays. Payment of the full amount of advance Tax provides this safety net. As mentioned earlier, interest is to be calculated on the amount of the tax assessed as reduced by the amount of advance tax already paid and the tax deducted at source. It follows that if the assessed tax is less than the amount of advance tax paid by the assessee, no interest can be levied whatever may be the amount of delay in the furnishing of the return. Therefore, to safeguard against any possible delay in the filing of the return, the assessee should arrange to pay such amount as advance tax as may fully cover the tax that may be found payable for that assessment year. For this purpose, the assessees will be well advised to correctly estimate the amount payable as advance tax as per the provisions of Section 209, and pay the instalments as indicated in sec. 211. To cover up the possibility of the assessed tax being found to be more than the advance tax estimated by him, the assessee will be well advised to pay same extra amount in the March instalment of advance tax so that the advance tax paid by him is more than the tax payable for that assessment year. When the assessed tax is less than the advance tax paid by the assessee and the tax deducted at source, there will be no amount on which interest under section 234A can possibly be calculated. This extra payment of advance tax will totally insure the assessee against the levy of interest for delay in the filing of the return. The extra amount of advance tax will be refunded to the assessee on completion of the assessment with interest calculated from the 1st of April of the assessment year. The assessee will therefore lose interest for just a fortnight on the extra amount paid as advance tax. This, in any case, is a small cost for gaining immunity against levy of interest under Section 234A, and if this recommendation is accepted, the assessee will be able to successfully avoid the payment of interest for delay in the fùrnishing of the return. Payment of advance tax as above, will also save the assessee from levy of interest under Section 234B and 234C.

Can the I.T. Department attach under section 226(3) of the I.T. Act an actionable claim, equitably assigned ?

By

N.S. Raghavan

With a liberalised procedure for sanctioning of advances to parties engaged in executing contracts, the banks naturally have taken steps to safeguard the advances and in the process obtain an irrecoverable power of attorney in favour of the banks concerned by which the bank is authorised to receive payment of all amounts due and which may becomes due from the parties under various contract works and to appropriate such amounts in reduction of the advances given by the bank. High Courts have decided that in view of the finding that interest had already been created in favour of bank, department cannot have any claim over those amounts. The income-tax liability of the department could not, therefore, be enforced over the amounts which have already been transferred in favour of the bank. The intention to create security had been manifested by producing the powers of attorney before the banks.

General

1. With a liberalised procedure for sanctioning of advances to parties engaged in executing contracts, the Banks naturally take steps to safeguard the advances and in the process, the Banks obtain an irrevocable power of attorney in favour of the bank by which the bank is authorised to receive payment of all amounts due and which may become due from the various parties under various contract works and to appropriate such amounts in reduction of the advances given the bank. The contractors always aver that the powers of attorney constitute an equitable assignment of the amounts due or which may become due to them and the bank is the constituted owner of those amounts. The departments always contends that the equitable assignments are subject to the amounts due to the Central revenue, that the bank does not have any priority or charge or lien over those amounts, that the arrears of tax sought to be recovered do not relate to periods subsequent to the execution of the powers of attorney and that the amounts do not cease to be payable to the banks and that the ITO has jurisdiction and power to issue the impugned orders.

Question Involved

2. The main question is whether the powers of attorney, amount to an equitable assignment of the monies due to the banks who executed the powers of attorney in favour of bank authorising the bank to receive the

monies and to adjust the same toward the amount borrowed by the contractor from the bank. The contractors argue that the bank has an interest in the funds, since an irrevocable power of attorney has been executed. The department, on the other hand contends that they are only pay orders and that the bank has no control over the money covered by the bills to be presented by the contractor and he is not, therefore, competent to make an assignment in favour of the bank. It is better to understand the distinction between an "actionable claim" or a "chose in action" and a "pay order".

Actionable claim

3. As per the definition contained in the Transfer of Property Act, an "actionable claim" is a claim to any debt other than a secured debt or any beneficial interest in movable property not in the possession of the claimant. Sec. 130 enables the transferee of an actionable claim to sue or institute proceedings for the same in his own name without obtaining the transferor's consent and without making him a party thereto. The validity of transferring a specific fund towards the payment of debt incurred by the debtor cannot therefore be questioned.

Chose in action

4. A "chose" means a thing and a "chose in action' means a thing in action. According to Halsbury the expression "chose in action" in the literal sense means a thing recoverable by action as contrasted with a "chose in possession' namely a thing of which a person has not only ownership but also actual physical possession. A chose inaction is assignable and is treated as property under Chapter 8 of the Transfer of Property Act which calls it "an actionable claim".

A chose in action can be in respect of a future claim also.

Case law on the points :

5.1 While construing the power of attorney the Supreme Court observed in *Bharat Nidhi Ltd. vs. Takhatmal* AIR 1969 Sec 313, that "it is a necessary to bear in mind that the relationship of the two parties, Malhotra and the bank, was that of a borrower and lender and that the document was brought into existence in connection with a proposed transaction of financing of Malhotra's bills for supplies under the contract. The intention of the parties was to provide protection for the loan and to secure payment of the loans. It was with this object in view the lender was authorised to receipts towards repayment of the loans. The power of attorney authorised appellant to receive payments of the bills and to appropriate the receipts towards repayment of the loans. The powerof attorney authorised appellant to receive all monies due or to become due to Malhotra in respect of pending or future contracts with the Government authorities. on the basis of these recitals the Supreme Court held that there was a valid equitable assignment of future debts and that the debt passes on to the assignee as and when

it comes into existence. The Supreme Court repelled the contention that there was no engagement to pay out of specific fund and therefore, there was no assignment."

Before the Supreme Court a contention was raised that the document was only a pay order. This contention was also rejected by observing that an interest in a specific fund was created by the power of attorney and that it was irrevocable. It is observed that there is an essential distinction between a pay order and an assignment. A pay order is a revocable mandate. It gives the payee no interest in the fund whereas an assignment creates an interest in the fund and is not recovable. It was for these reasons that the Supreme Court held that there was a sufficient equitable assignment of a specific fund in favour of the appellant therein.

5.2 On the question as to what constitutes an equitable assignment the Supreme Court has referred to *Palmer vs. Carey* LR (1926) AC 703 at 706 where it was held : "The law as to equitable assignment, as stated in *Rodick vs. Gandell,*is this : The extent of the principle to be deducted is that an agreement between a debtor and a creditor that the debt owing shall be paid out of specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to play such funds to the creditor, will create a valid equitable charges upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers."

5.3 The Madras High Court in the decision in *Navajee vs. Administrator General of Madras* ILR 38 Mad 500 held that when an instrument refers to specific funds out of which the claims of a creditors are to be satisfied, the creditor has a charge on such fund.

5.4. The Calcutta High Court referred to the law as to equitable assignment as stated by Lord Tvuro in (1850) 1 Mag M and G 763, *Rodick vs. Gandell* in the following manner :

> ".....an agreement between a debtor and a creditor, that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owning money or holding funds belonging to the giver of the order directing such person, to pay such funds to the creditor, will create a valid equitable charge upon the fund, in other words, will operate as equitable assignment of the debts or fund to which the order refers."

Conclusion

6. Following the principles stated by the Supreme Court and other High Courts, an irrecoverable power of attorney by which an equitable assignment is created in favour of a bank creates an interest in favour of the bank over the monies due. The tax payers may usefully follow the above decisions and argue their cases suitably to thwart the action of the I.T. Department.

MAGAZINE

Compensation for surrender of tenancy rights - Whether taxable as income of a casual and non-recurring nature?

By

T.N. Pandey

In a number of decisions culminating in the Supreme Court decision in the case of CIT vs. B.C. Srinivasa Setty, the view taken is that in case of zero-cost capital assets, tax could not be levied on the gain arising on their transfer. The Finance Act, 1987 provided that in cases of self generated goodwill the cost would be taken as 'nil' for taxing capital gain arising on its transfer. Till 31-3-1995 this position continued on assets other than goodwill like tenancy rights, route permits etc, where the cost of acquisition was not continued to escape the net of taxation. However, the Allahabad High Court in Gulab Chand's case took a view that such gains could be taxed as income of casual and non-recurring nature.

Analysing the decision, the author has opined that the decision is not correct and for this view be has drawn support from a recent decision of the Calcutta High Court where too, differing from the Allahabad High Court, view, the Calcutta High Court has held that such gains are exempt from tax and cannot be taxed as income of a casual and non-recurring nature. The law discussed by the author would be relevant upto the asst. year 1994-95 as with effect from 1-4-1995, gains arising from the transfer of tenancy rights would be taxableas capital gains taking the cost of acquisition as NIL.

1. The issue whether capital gain arises on transfer of capital assets whose cost of acquisition is zero has been judicially considered on a number of decisions in the past. The landmark decision on this issue is that of the Supreme Court in the case of *CIT vs. B.C. Srinivasa Setty* (1981) Taxation 60 (3) 124, (1981) 128 ITR 294 (SC). It has been held by the Supreme Court in this case that section 45 contemplates an asset which has a cost of acquisition. Hence in a case where cost of acquisition is nil, there would be no liability for tax on capital gains on relinquishment of such rights for consideration.

2. Supreme Court's decision

In the context of taxation of capital gain on transfer of goodwill, the Supreme

Court has said in Setty's case that all transactions encompassed by section 45 must fall under the governance of its computation provision, i.e. section 48 of the Income-tax Act, 1961. A transaction to which this provision cannot be applied, must be regarded as never intended by section 45 to be subject of charge; what is contemplated by section 48(II) is the asset in the acquisition of which it is possible to envisage a cost, i.e., it must be an asset which possesses inherent quality of being available on the expenditure of money to a person seeking to acquire it and that none of the provisions pertaining to the head "capital gains" suggests that they include an asset in the acquisition of which no cost of acquisition at all can be conceived. Therefore, according to the Supreme Court, when an asset, in acquisition of which no cost at all can be conceived, the consideration received is the capital value of the asset and not any profit or gain and the date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital-gains. Applying this principle to the goodwill in the above case, the Supreme Court held that in case of the goodwill generated in a new business, it is not possible to determine the date when it comes into existence.

3. Supreme Court's decision partially superseded

The A.P. High Court in *Sri Krishna Dairy & Agricultural Farm vs. CIT* (1988) 169 ITR 291 A.P., was required to consider whether on sale of calves, capital gain arises. The court decided that in the case of a Dairy, there was no cost for acquisition of calves and in view of Supreme Court's decision in Srinivasa Setty's case (supra), capital-gain could not result from the sale of calves. The lacuna pointed out by the Supreme Court regarding goodwill was made good by the amendment of section 55 by the Finance Act of 1987 with effect from 01-04-1988 by providing that the cost of self generated goodwill will be taken 'nil' for the purposes of computation of capital-gains, but, no such amendment was made concerning some other capital assets like tenancy rights, stage carriage permits, loom hours etc. Hence after the amendment regarding goodwill was made, questions arose whether gain arising consequent to the transfer of the above referred categories of assets where cost was nil could be subjected to tax as capital gain. Obviously, the answer to the query was in the negative in view of the Supreme Court's verdict in *Srinivasa Setty's* case (supra) and such gains escaped the incidence of taxation.

4. Allahabad High Court's view

However, the Allahabad High Court in one of its decisions in the case of *CIT vs. Gulab Chand* (1991) 103 Taxation 196 (All.) (1991) 192 ITR 495 (All.) gave a queer interpretation of the provisions of the Income-tax Act for assessing such gains. If directed the Income-tax Officer to assess such gains as casual incomes. It the operative pat of the High Court's decision is red, it is clear that the High Court has accepted the position that the

receipt in question is in fact a receipt of a capital nature. Discussing the provisions of section 10(3), the High Court has mentioned about clause (1) of the Proviso which takes away capital-gains chargeable under the provisions of section 45 from the purview of casual income. Yet it has said that such gains could be assessed as casual income. The operative portion of the High Court's order reads as under :

> "The question boils down to : Whether the receipt in question is exempted under sub-clause (i). For this sub-clause to be attracted, it is not enough that it is a capital receipt, it must be a capital receipt chargeable under section 45. Capital gains are charged to tax by section 45. The mode of computation of a capital gain is prescribed by section 48. Supreme Court has held that where the cost of acquisition of an asset is nil, the capital gain is not chargeable to tax (vide *CIT Bangalore vs. B.C. Shrinivasa Setty* (1981) Taxation 60 (3) 124, 128 ITR 294). On this reasoning, even if the said receipt is a capital gain, it is not a capital gain chargeable under the provisions of Section 45 for the simple reason that there was no cost of acquisition for the tenancy right, (vide *CIT vs. Marka Pakula Agamma*, 165 ITR 386) (A.P.) Accordingly, it must be held to be a receipt of a casual and non-rrcurring nature within the meaning of clause (3) of section 10. The Appellate Tribunal was in error holding that the said receipt was a capital gain and in further directing the ITO to compute the tax treating it as a capital-gain."

The High Court's reasoning is that clause (i) to Proviso is not applicable in the assessee's case because even if the receipt is a capital-gain, it is not chargeable as such under the provisions of section 45 because of the two decisions mentioned in the High Court's order and quoted in the extract given earlier. Accordingly, it must be held to be a receipt of a casual nature and not a capital-gain. Hence receipt to be of a capital nature, but since capital-gain could not be taxed, the capital asset being a zero cost capital asset, the receipt could be considered as casual income.

5. Allahabad High Court's view *prima facie* not correct

The High Court's decision needs consideration from two angles, viz. :

(1) Even if the premise that the receipts are casual income is correct, could these be taxed on this ground without bringing these into any of the heads mentioned in section 14;

(2) If a receipt falls for consideration under one of the heads enumerated in Section 14 and found exempt, can it be considered for taxation under other heads.

On both these important issues, the decision is silent. For being taxed, an income has to fall in one of the heads enumerated in Section 14.

The scope and function of section 14 was elaborately explained

in *CIT vs. Smt. T.P. Sidhwa* (1982) 133 ITR 840 (Bombay). For this purpose, the Court relied upon the interpretation placed on section 6 of the Indian Income-tax Act, 1922 (corresponding to section 14 of the 1961 Act) by the Supreme Court in *Nalinikant Ambalal Mody vs. S.A.L. Narayan Rao, CIT* (1966) 61 ITR 428. The Court observed" "....on a reading of the decision of the Supreme Court in *N.A. Mody's* case (1965) 61 ITR 428, the following principles clearly emerge :

(i) Several heads of income mentioned in section 6 are mutually exclusive; a particular income can come only under one of them.

(ii) If the receipts can be brought under one had of income, i.e. the fourth head of income in section 6, viz. profits and gains of business, profession or vocation, they cannot be brought under the residuary head as the heads of income are mutually exclusive.

(iii) Whether an income falls under one head or the other has to be decided accordingly to the common notion of practical men, for, the Act does not provide any guidance in the matter. In other words, the heads of income must be decided on the nature of the income by applying practical common notion and not by reference to the assessee's treatment of income.

(iv) Whether an income is included in any of the heads other than the residuary head would depend on what kind of income it is, and if the income is the profit or gain of profession, it cannot come under section 12, for, section 12 does not say that an income which escapes taxation under a preceding head will be computed under it for chargeability to tax.

(v) An income has to be brought under one of the heads in section 6 (of 1922 Act) and can be charged to tax only if it is so chargeable under the computing section corresponding to that head. Income which comes under the fourth head, that is, professional income, can be brought to tax only if it can be so done under the rules of computation laid down in section 10. If it cannot be so brought to tax, it will escape taxation even if it be included in the total income under section 4." (p. 849).

Hence it was necessary for the High Court to indicate under which head the net casual income should be taxed while giving its decision. It cannot automatically be charged under the head "Income from other sources".

Coming to the second issue, there are number of decisions where it has been held that income falling under one specific head cannot be taxed under another. In *Sultan Bros. (P) Ltd. vs. CIT* (1964) 51 ITR 353, 452 (SC), it has been said that several heads of income mentioned in section 6 of the 1922 Act (corresponding to section 14 of the 1961 Act) are mutually exclusive. Similar decisions have been taken in the following cases :

(i) *United Commercial Bank Ltd. vs. CIT* (1967)

(ii) *East India Housing and Development Trust Ltd. vs. CIT* (1961) 42 ITR 49 (SC).

In the latter case, it has been said that the classification under distinct heads of income profits and gains is made having regard to the sources from which income is derived. Income-tax is undoubtedly levied on the total taxable income of the tax payer and the tax levied is a single tax on the aggregate taxable receipts from all the sources. It is not a collection of taxes separately levied on distinct heads of income. But the distinct heads specified in section 6 of the 1922 Act (corresponding to section 14 of the 1961 Act) indicating the sources are mutually exclusive and income derived from different sources falling under specific heads has to be computed for the purpose of taxation in the manner provided by the appropriate section. If the income from a source falls within a specific head set out in section 6, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head. The income derived by the company from shops and stalls is income received from property and falls under the specific head described in section 9 of the 1922 Act. The character of that income is not altered because it was received by a company formed with the object of developing and setting up markets.

(iii) *CIT vs. Chugandas & Co.* (1965) 55 ITR 71.

It bas been observed in this decision also that an income which is chargeable under a specific head cannot be brought to tax under another head either in lieu of or in addition to that head.

In *CIT vs. Cocanoda Radha Swami Bank Ltd.* (1965) 57 ITR 306 (SC), the Supreme Court has said that whether a particular income is part of business income falls to be decided not on the basis of provisions of section 6 of the 1922 Act but on commercial principles. It is only when an income cannot be charged to income tax under any of the heads mentioned in clauses A to E of Section 14 that the same shall be chargeable to tax under the residuary head viz. income from other sources mentioned in clause F of Section 14 under the specific provision of section 56(1).

Generally speaking, a receipt consequent to the transfer of a capital asset is a capital receipt. Hence not liable to tax as income. But in terms of definition of income in section 2(24) it becomes chargeable to tax as capital gain to the extent of net gain arising out of such transfer. Hence if the amounts received is compensation for surrender of tenancy right, the gain imbedded in such receipts can be taxed only under the head "Capital gain" and under no other head. If it cannot betaxed as capital gain, it will not suffer any tax

Thus for the reasoning given earlier it is obvious that Allahabad High Court's view is *prima facie* not correct.

6. **Calcutta High Court's view**

The stand that Allahabad High Court's decision is not correct is confirmed by the Calcutta High Court's decision in the case of *B.K. Roy Pvt. Ltd. vs. Commissioner of Income-tax* (1995) 125 CTR (Cal.) 50. In the case before the Calcutta High Court the issue related to taxation of a sum of Rs. 21,20,000 received as compensation for surrender of monthly tenancy. The tenancy rights had no cost of acquisition. The Income-tax Department proposed to tax it relying on the Allahabad High Court's decision in the case of *Gulab Chand* (supra). Drawing support from its earlier decision in the case of *A. Gasper vs. CIT* (1979) 117 ITR 581 (Cal.), which was subsequently affirmed by the Supreme Court in the case of *A. Gasper vs. CIT* (1991) 192 ITR 382 (SC), the Court has said that a receipt which is exempt as capital gains (i.e. compensation for monthly tenancy) cannot be brought to tax as casual and non-recurring receipt specifically in view of proviso (i) to section 10(3) of the Income-tax Act, 1961. Hence the department's approach based on Allahabad High Court's decision in the case of *Gulab Chand* has been considered erroneous by the Calcutta High Court.

7. **Tenancy Rights made taxable by the Finance Act, 1994 from the Asst. Year 1995-96**

The Finance Act, 1994 has amended section 55 (2) to provide that cost of acquisition in relation to capital asset being goodwill of a business, tenancy rights, stage carriage permits or loom hours -

(a) in the case of acquisition of such assets by the assessee by purchase from a previous owner, means the amount of purchase price; and

(b) in any other case (not being a case falling under sub-clauses (i) to (iv) of sub-section (1) of section 49, shall be taken to be nil.

Thus the entire amount received for surrender of tenancy rights where the cost of acquisition is nil, will thus be subjected to tax as capital gain after excluding cost of transfer etc., if any.

8. **Concluding remarks**

The law as discussed in the article will be applicable to cases arising upto 31-3-1994. In such cases, compensation received on account of surrender of tenancy rights will be exempt from tax and thus would not attract tax either as gain arising from the transfer of a capital asset or as income of a casual and non-recurring nature. With effect from 1-4-1995, such receipts would attract tax as capital gain taking into account the law as laid down in (amended) sub-section (2) of section 55 of the Income-tax Act, 1961.

Pitfalls in law relating to purchase of immovable property by the Central Government - Powers of 'Appropriate Authority'

By

S.P. Pahwa

In this article Shri S.P. Pahwa, Corporate Tax Planner has suggested for a fresh look on the provisions of the law contained in Chapter XX-C of the Income-tax Act, 1961 with regard to purchase of immovable property by the Central Government and Powers of the Appropriate Authority. Whether the Appropriate Authority has inherent power to file a particular application for clearance certificate or he is bound to act on the same i.e either to grant the certificate of clearance or to acquire the property. For various technical reasons he may not be in a position to acquire the property. For various technical reasons he may not be in a position to acquire the property, then he should issue the Clearance Certificate. Since this has not been done in many cases,, it has given rise to various points of litigation. Hence the need to reconsider the legislative provisions with reference to case law.

Relevant provisions are contained in sections 269U to 269UD contained in chapter XX-C of the Income-tax Act, 1961. This apart relevant provisions are also contained in section 230A of the Income-tax Act, 1961 for obtaining Tax Clearance Certificate - in both the cases depending on the limit of 'apparent consideration' and the area where the property is situated. Both provisions are under amendment by the Finance Bill, 1995 with reference to raising of limits of 'apparent consideration'. However, without dwelling on the limits, in this article, it is proposed to examine other provisions of the Chapter including powers of the Appropriate Authority and the meaning of the expression 'apparent consideration'.

2. The expression 'apparent consideration' stands defined in section 269UA(b) with reference to various of types of agreements for transfer of the immovable property in question. It may be recalled that the provisions of chapter XX-C enabling the Central Government to purchase immovable properties in certain cases were inserted by the Finance Act, 1986 and came into force with effect from 1-10-1986. The applicability of the provisions to the Metropolis had been done from time to time by way of Notifications. The provisions of Chapter XX-C need to be read with rules 48-I, 48-J, 48-K and 48-L of the Income-tax Rules, 1962. The most important being the statement to be furnished under Form No. 37-I i.e. within the meaning of rule 48L(2).

3. It is an elementary rule of interpretation that an instrument like a statute is to be read as a whole to find out the intention of the parties or the legislation. Though by now we have many decisions from our courts but it would suffice to refer to Lord Halsburry's decision in the case of *Charles Robert Lander vs. George F. Duffey* (1988, 13 AC 294) where it was observed :

> "that you must look at the whole instrument inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it."

4. The word 'transfer' has been defined in section 269U(h) in the repealed Chapter XX-A and also now in section 269UA(f) of Chapter XX-C. Restrictions on transfer of immovable property stand imposed by section 269UC and this section starts with a non-obstante clause excluding the provisions of the Transfer of Property Act. But, in a given case for the purposes of the provisions of section 269UA(f), whether there is transfer or not, the provisions of section 269UA(f) defining the term 'transfer' can be lost sight of irrespective of the non-obstante clauses. At the same time, in the scheme of the Income-tax Act, while defining the term 'transfer', if possession of the property has been allowed to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act. The first pitfall is whether the nature referred to in section 53A has been incorporated (in- built) while defining the term 'transfer' and whether section 53A can be given a complete 'go-by'.

5. The very definition of the term 'transfer' as contained in section 269UA(f) read with the provisions of section 53A shows that the factum of transfer has to be ascertained with reasonable certainty and in case the transferee has in part performance of the contract taken possession of the property or any part thereof, it would constitute a transfer.

6. In the case of *Megsons Exports vs. Union of India and Others* (1992) 106 Taxation 351 (1992, 194 ITR 225) where the possession of the property was handed over in part performance of the contract, quashing the order of Appropriate Authority, the Delhi High Court held that when the appropriate authority received an application under section 269UC he had no jurisdiction to file the application as was done in this case. He had to exercise the option which was available within a stipulated time i.e. either to buy the property or to issue 'no objection certificate'. In view of the expiry of statutory period, the Government had lost its power to purchase the property. The Delhi High Court followed its decision in the case of *Tanvi Trading and Credit's* case (1991) 102 Taxation 559, (1991, 188 ITR 623). The Supreme Court dismissed the Special Leave Petition filed by the department. Thus the law can be stated that when the appropriate authority receives an application under section 269UC, the Appropriate

Authority has no jurisdiction to file that application—it has to exercise the option either to purchase the property or to issue the no objection certificate.

7. Now we have another leading decision on the subject from the Rajasthan High Court in the case of *Rajasthan Patrika Ltd. vs. Union of India* (1994) 122 Taxation 206, (1995, 213 ITR 445) holding, *inter-alia* that where the parties have violated the provisions of the Income-tax Act and have acted in manner so as to thwart the very purpose of the provisions relating to the restrictions on transfer of immovable property and to thwart the Central Government's pre-emptive right of purchase besides the alternative of either purchasing or issuing a no objection certificate. The option is also available not to act upon the statement in Form No. 37-I which is found to be violative fo the provisions of the Income-tax Act and to prosecute the concerned parties by resorting to the machinery under the Act. In this case it was noted that the parties had affected the transfer before filing the statement in Form No. 37-I and thus violated the relevant provisions of the Act, it was certain within the rights of the Appropriate Authority not to act upon the statement filed by the parties in Form No. 37-I. The Appropriate authority was held that in issuing the show cause notice for prosecution for failure to comply with the provisions of section 269UC.

8. In the case of *T. Amudha vs. Members, Appropriate Authority* (1993, 202 ITR 525) the petitioners had entered into an agreement of sale on 9-8-1989 for total consideration of Rs. 155 lakhs or so but filed the Statement under section 269UC on 23-8-1989. The Appropriate authority rejected the statement and directed the vendors to file a fresh agreement after removing some of the irregularities and infirmities. The Madras High Court, on a writ petition, remitted the matter to the Appropriate Authority for a fresh order taking note of the development which had resulted in a decree in favour of the petitioners.

9. The pitfalls arising from the interpretation of various decisions of the courts give rise to many questions whether the jurisdiction of the Income-tax Department is limited and whether and to what extent they can make a roving enquiry with regard to the title of the property. Whether the law as shrined in the said chapter can be applied to the partnership to test the agreement in the light of various provisions of the Partnership Act. When an appropriate authority is of opinion that the agreement is invalid, is he bound to make a pre-emptive purchase of the property. Since the provisions/terms/clauses in an agreement are the 'look-out' of the parties, whether the Appropriate Authority has jurisdiction to decide and say that the agreement is *ab-initio* void and is contrary to the principles of the Partnership Act.

10. In *Rajata Trust vs. Chief Commissioner of Income-tax* (1992, 193 ITR 220) it was pointed out that the decree of the High Court is subsequent to the order of the appropriate authority. One of the contentions by the

assessee's counsel in the case of *T. Amudha* (supra) was whether there is inherent power in the appropriate authority to decide the issue with regard to the title and validity of agreement and if he feels that the agreement is not valid, it is open to him (A.A.) to return the application as defective.

11. Without multiplying number of cases, it is pointed out that fresh look is needed on various decisions given by the courts with regard to powers of the Appropriate Authority. various issues can be settled on the basis of clear provisions of the statute leaving less discretion for interpretation of the provisions. Before parting, I would also refer to the Madras High Court's decision in the case of *Appropriate Authority vs. Naresh M. Mehta* (1993, 200 ITR 773) where it was also held that the jurisdiction of Appropriate Authority is limited either to pass an order within the specified period or to give a no objection certificate. Accordingly, it is suggested that a fresh look on the provisions for purchase of the immovable property by the Central Government is urgently needed so that the desired objects of the legislative provisions are achieved without prolonged litigation.

Taxability of allowance given to employees for purchase of newspapers and periodicals

By
K.R. Gupta

In a recent decision in the case of Fitzpatrick vs. India Revenue Commissioners reported in (1995) 213 ITR 411, the House of Lords has held that the allowance paid to journalists to purchase newspapers and periodicals was not dedcutible from their income liable to income-tax. In this article, the author, who is an ex-Member, Central Board of Direct Taxes and practising as a tax Consultant, has discussed this judgment in the light of the provisions of section 10(14) of the Income-tax Act, 1961 and concluded that the ratio of this decision would hold good while deciding the claim of exemption of similar allowance u/s 10(14) and accordingly an allowance received by an employee from his employer for purchase of newspapers and periodicals will not be exempt in the hands of the employee.

In a recent decision in the case of *Fitzpatrick vs. Indland Revenue Commissioners* reported in (1995) 213 ITR 411, the House of Lords has held that the allowance paid to journalists to purchase newspapers & periodicals was not deductible from their income liable to income-tax pursuant to section 189 of the Income & Corporation Taxes Act, 1970, since in reading newspapers and periodicals they had purchased they were not acting in the performance of their duties. Since this decision may be relevant in the context of the provisions of section 10(14) of the Income-tax Act, 1961 in our country, it will be appropriate to discuss the facts of the case and the decision in detail.

2. In this case, there were ten Scottish and English appeals. In the Scottish appeals, the tax-payers were five journalists who were employed in 1985-86 by a company which published two Scottish newspapers. Each of the taxpayers received a newspaper allowance as reimbursement towards expenses incurred in purchasing newspapers and periodicals. The taxpayers appealed against assessments to income-tax of the newspaper allowance, claiming that such allowance was deductible under section 189(1) of the Income & Corporation Taxes Act, 1970, which reads as under :

> "(1) If the holder of an office or employment is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment .....or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

The Special Commissioners dismissed the appeals holding that the taxpayers by reading newspapers and periodicals were providing themselves with background material with which to approach their respective duties as journalist and were not at that time preparing articles etc. for publication in the course of performance of the duties of their employment. On appeals by the tax-payers the Court of Session dismissed the appeals. Thereafter the taxpayers filed appeals before the House of Lords. In the English appeals also, the taxpayers, who were five journalists, received from their employers and allowance as re-imbursement of the expenditure incurred in purchasing newspapers and periodicals. They were assessed to income-tax in amounts which included the sums re-imbursed to them by way of the allowance. On appeal, the Commissioners allowed all the appeals, holding that the amounts re-imburssed were in respect of expenditure incurred by the taxpayers wholly, exclusively and necessarily in the performance of the taxpayer's duties and accordingly deductible. Warner J. dismissed the Crown's appeals in the cases of 4 journalists who were employed as picture editor, an assistant Chief sub-editor, a sports reporter and a staff photographer, but in the case of the fifth journalist who was employed as a news layout journalist, he allowed the appeal on the ground that there was no finding of fact that the taxpayer's reading of the publications was a necessary part of the performance of the duties of his employment. On further appeal, the Court of Appeal dismissed the Crown's appeals, and allowed the tax-payer's appeal. Thereafter, the crownfiled appeals in all cases before the House of Lords. The House of Lords dismissed the Scottish appeals and allowed the English appeals, holding that on a true construction of section 189(1) of the Act of 1970 the claims of the tax-payers in their respective occupations as journalist did not fall within the ambit of the provisions since when a journalist reads newspapers and periodicals he is not acting "in the performance" of his duties as a reporter, author, editor, photographer or like occupations. The following observations of Lord Templeman appearing in the judgement are noteworthy :

> "No one doubts that a journalist may benefit from information and knowledge concerning past and present events and from former and contemporary examples of style and presentation. He may with profit read the past journalist works of William Howard Russell, Bernard Shaw, Neville Gardus, and Henry Longhurst, amongst others. He may with profit read the contemporary leading articles of "The Times" or study the photographs in "The Star" or the headlines in "The Daily Mirror," or the layout of "The Daily Express." Before a journalist begins his daily work he must form a view of what he ought to be doing during the day. But he is not performing his duties when he prepares for work and there are a veriety of ways in which he may choose to prepare and inform himself. The evidence in the present appeals largely ignored the help to be derived from Reuters, the press Association and other

news services and also the immediate help of radio and television broadcast. A journalist is free to choose his preparatory studies. It is said that some journalists best obtain ideas and keep up to date by wining and dining. The journalists in the present case chose to spend several hours every day reading a formidable mass of repetitive newsprint dealing with the events of yesterday. In my opinion, they were not, in the course of that reading, engaged in the performance of the duties for which they were paid.:

3. In India the issue of taxability of allowance received by an employee from his employer for purchase of newspapers & periodicals has to be decided in the light of the provisions of section 10(14) of the Income-tax Act, 1961. This section grants exemption from tax in respect of any such special allowances or benefit, not being in the nature of a perquisite within the meaning of section 17(2), specifially granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, as the Central Government may specify, to the extent to which such expenses are actually incurred for that purposes. For claiming exemption of an allowance under this section, it is necessary to fulfill the following conditions.

(a) a special allowance or benefit must be granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment or profits.

(b) The special allowance or benefit must be notified for exemption by the Central Government, and;

(c) The special allowance must be actually spent for meeting expenses incurred for the purpose for which it was granted;

4. The various allowances which have been notified for exemption by the Central Government u/s 10(14) do not include allowance granted to an employee by the employer for purchase of newspapers and periodicals. They, however, include an allowance granted for encouraging academic research and any other professional pursuit. The expenses incurred by an employee on purchase of newspapers and periodicals cannot be said to be incurred on academic research or any professional pursuit. Since the allowance for purchase of newspapers and periodicals has not been notified for exemption by the Central Government, it will not be exempt under the provisions of section 10(14) and, will, therefore, be included in the taxable income of the employee.

5. It may be further point out that like section 189(1) of the Income & Corporation Taxes Act, 1970 of U.K., section 10(14) of the Income-tax Act, 1961 requires that for claiming exemption the money must be spent wholly, necessarily and exclusively in the performance of the duties of an officer or employment of profit. Therefore, for deciding as to whether the allowance granted for purchase of newspapers and periodicals has been

spent wholly, necessarily and exclusively in the performance of the duties, the decision of the *House of Lords in Fitzpatrics* case (supra) would be relevant. If the ratio of this decision is applied, the amount spent by an employee on purchase of newspapers & periodicals cannot be said to be an expenditure incurred in the performance of the duties of his employment and accordingly the allowance received by him would be taxable in his hands.

6. Here it will be relevant to mention that in the context of the provisions of section 37(1) of the Income-tax Act, 1961, the Courts have held that expenditure incurred on foreign tour by a director of the assessee-company undertaken as a study-tour merely to get acquainted with new methods of production and new machinery or only for adding to the knowledge of the assessee-company's representatives is an allowable deduction, as such expenditure is incurred on the ground of commercial expediency with a view to earn greater profit. (See *Ambica Mills Ltd. vs. CIT* (1964) 54 ITR 167 (Guj.) and *Addl. CIT vs. Motipur Sugar Factory (P) Ltd.* 1981 Tax 61 (1) 9 (1981) 128 ITR 84 (Pat.)]. It is submitted that the ratio of these decisions would not hold good for the purpose of deciding the question of exemption of allowance received as re-imbursement of expenditure u/s 10(14). This is because under section 10(14), apart from the words "wholly and exclusively" which appear in section 37, the word "necessarily" has also been used. The use of the word "necessarily" implies that the employee or office holder has to show that the expenses he seeks to deduct are expenses that he has been necessarily obliged to incur and defray in the performance of the duties of the employment or office. Thus. this word has narrowed down very much the scope of any expenditure which can fairly be deductible. When an employee reads newspapers and periodicals to add to his knowledge and to keep himself up-do-date, he is not, in the course of that reading, engaged in the performance of the dufies of his employment and, therefore, it cannot be said that the expenditure incurred on purchase of newspapers and periodicals was necessarily incurred in the performance of his duties.

7. **Conclusion**

Since the words used in section 10(14) of the Income-tax Act, 1961 broadly correspond to those contained in section 189(1) of the Income & Corporation Taxes Act of U.K., the decision of the House of Lords in *Fitzpatrick's* case (supra) would be relevant for deciding the claim of exemption of similar allowance u/s 10(14) and accordingly an allowance received by an employee from his employer for purchase of newspapers and periodicals will not be exempt in the hands of the employee.

News & Views

HC admits plea against service tax on phone

The Delhi High Court on Monday admitted for final hearing writ petition challenging the constitutional validity of service tax imposed on telephone, insurance and stock brokers' services.

Chapter five incorporated in the Finance Act, 1994, has made services rendered in the three sectors taxable under the law.

The petitioner, Arvind Gupta a consumer rights activist, has contended that the service tax was imposed without proper authority of law as was no legislation for making the three services taxable.

The Centre never introduced any Service Tax Bill in Parliament to enact the Service Tax Act, nor did it bring any amendments to the Indian Telegraph Act, General Insurance Business (Nationalisation) Act and the Securities Contract (Regulation) Act, the petition said.

A division bench comprising Justice D.P. Wadhwa and Justice M.K. Sharma admitted the petition for final hearing after Gupta appeared in person in the court to represent his case.

Court also gave liberty to Gupta to file an application for early hearing of petition.

Source : Financial Express, dated 25-4-1995

Review of system to combat tax evasion stressed

The Public Accounts Committee has underlined the need for a critical review of the existing system of search and seizure to unearth black money and combat tax evasion.

In its 97th report on 'System appraisal — functioning of investigation circles', tabled in Parliament on Friday, the Committee said, 'search and seizure are exceptional powers conferred in exceptional circumstances for the purpose and, therefore, it is highly imperative and they are exercised efficiently in unearthing concealed income and wealth and also checking evasion of taxes.'

The House Committee in its report the provisions made in the Finance Bill, 1995 pertaining to a scheme under which undisclosed income detected as a result of search shall be assessed separately at a flat rate of 60 per cent. Although the Finance Ministry had stated that the proposed procedure would reduce the delay in assessments and make the operations more effective, Committee had declared to watch the enactment of the scheme, its actual implementation and efficiency, before making any comments.

The Committee regretted that in the present system of working, several vital data relevant to the search and seizure were not being maintained. It suggested that the Ministry of Finance should strive to 'evolve an appropriate data system so that a better evaluation of the extent of the usefulness of the search and seizure operations could be attempted.'

Referring to review cases where various irregularities, omissions, mistakes had been detected, the Committee said that the Finance Ministry should obtain all details of such cases and take steps, 'to fix responsibility of the officials concerned for the various omissions/commissions.' It further pointed out that the Finance Ministry should ensure that the records requisitioned by CAG for audit be given to it to enable the CAG to discharge its constitutional functions.

The Search and Seizure Manual as well as the departmental instructions require the Assessing Officers to keep in close touch with other officers concerned with outside departments/agencies like revenue intelligence, enforcement directorate, Customs and Central Excise Department, Sales Tax Department etc for effective follow up of search and seizure.

In this regard the Committee urged the Finance Ministry to ascertain the manner in which co-ordination was actually put into practice presently and review the efficacy of the present instructions/arrangements in this regard with a view to ensuring better co-ordination and thereby achieving better results in combating tax evasion.

The Committee also noted with concern that various registers and reports presented and which were, in fact, the basis for exercising effective monitoring and control of the functioning of the Investigation Circles.

Source : Financial Express, dated 29-4-1995

Tax Bar Association, Kota

The Editor,

Taxation,

174, Jorbagh, New Delhi-3

Sub : Information regarding Members of Executive Committee of Tax Bar Association, Kota for the year 1995 - 1996

Dear Sir,

We have great pleasure in informing you that the following members have been elected to the Executive Committee of Tax Bar Association, Kota for the year 1995-96.

1. President — Shri Virendra Kumar Jain, Advocate
   Tel. No. (O) - 20563 (R) - 428424

2.	Vice-President	Shri Surendra Kumar Vijay, C.A. Tel. No. (O)-28028 (R)-428028
3.	Secretary	Shri Sanjeev Kumar Bazari, C.A. Tel. No. 24573/21059.
4.	Joint Secretary	Shri Yashwant Lodha, Advocate Tel. No.20184/21056
5.	Treasure	Shri R.A. Agarwal, C.A. Tel. No. (O)-25130 (R)-420183
6.	Chairman, Study Circle :	
	Income tax	Shri C.M. Birla, C.A. Tel. No. (O)-23256/29256 (R) -429257/424316
	Sales Tax	Shri Mukesh Gupta, Advocate Tel. No. 22667

	Executive Members :	Tel. Nos.
1.	Shri R.C. Jain, Advocate	(O) -23613, (R) -25228
2.	Shri D.P. Bazari, Advocate	(O) -24573, (R) -21059
3.	Shri S. Somani, C.A.	(O) -23088, (R) -426288
4.	Shri S.D. Jajoo, C.A.	(O) -24691, (R) -426583
5.	Shri R.R. Mittal, C.A.	(O) cum (R) -21324
6.	Shri M.M. Sharma, Advocate	(O) -27188, (R) -20611
7.	Shri Dinesh Bhargava, Advocate	(O) cum (R) -20163
8.	Shri R.K. Gupta, C.A.	(O) - 20308(R) 23507

This is for your Kind information and record. Kindly publish the same in the Journal.

Thanking you,

Your Faithfully,
For Tax Bar Association,
Sd/-
(Secretary)

Dated : April, the 17th, 1995.

Notes

News & Views

Ficci picks holes in Budget proposals

This year's Budget proposals have been described as weak in promoting savings by the Ficci. Highlighting this, Ficci, in its post-budget memorandum to the government, has stated that in the present context when domestic savings have declined from the level of 23.7 per cent of the GDP in 1990 to 20.2 in 1993-94, the Budget should have come out with steps to boost the falling rate of savings.

Ficci points out the need to accelerate growth at a rate of 7-8 per cent to overcome the problems stemming from poverty and unemployment. This would require investments at around 30 per cent and a domestic saving of 28 per cent of the GDP. Ficci highlighted that the Budget should have announced more effective measures like abolition of tax on dividend, reduction in the long term capital gains tax, exemption of sales proceeds of shares from the capital gains tax if reinvested in shares and mutual funds increase in basic exemption limit of personal taxation to Rs. 50,000, applicability of maximum marginal rate of tax to incomes which are over Rs. 2 lakh etc.

Equally important would have been, at least, abolishing surcharge on corporate tax considering the multiple effect of investable resources with the coporates. The memorandum states: "It is disappointing to find that inspite of the realistion that lower tax rates encourage better compliance and higher revenue collections, no proposal has been made for reducing the taxes rates to bring them in line with those prevailing elsewhere. To globalise, we must be in tune with the others".

At 46 per cent, the rate of corporate tax is one of the highest in the world and it affects competitiveness, expansion and diversification, according to Ficci. Ficci has suggested that this rate be reduced to 35 per cent and stabilised at 30 per cent over the next 2 to 3 years and it adds that surcharge be dispensed with immediately. Ficci has also suggested that tax rates on Capital gains for domestic companies should be brought at par with those for FIIs. In any case, tax on long term capital gains should be reduced from 30 per cent to 20.

In case income from dividend has to be taxed, Ficci has suggested that the payment of dividend should be at par with that of interest on borrowings for the purpose of deductions while computing profits. Interests on time deposits should be withdrawn and TDS should be required only on actual payment of interest on time deposits or when such fixed time deposits are renewed. It is also suggested that a uniform limit of Rs. 10,000 be provided

for TDS requirement in respect of interest and dividend incomes in terms of Section 193, 194 and 194A.

On the hybrid system of accounting, Ficci has said discontinuing it as a rule of law might be construed as violation of the fundamantal rights to carry out business. It says accounting standards should only be framed by the government after consulting professional bodies.

The turnover limit of Rs 40 lakh for compulsory audit of accounts under Section 44AB should be hiked to at least, Rs 1 crore. On indirect taxes, it has called for the setting up of a Settlement Commission and a Tariff Commission. It has also suggests rule 9 of the Customs Valuation Rules, 1988, be amended.

Source : Economic Times, dated 5-5-1995

SC ruling on Income-tax time extension

In a recent judgment, the Supreme Court has held that an income tax officer is bound to consider the applications made by assessees under Section 138(2) of the Income-tax Act asking for extension of time after expiry of the period prescribed to file income tax returns.

It has been held that once the assessee makes an application for extension of time to the ITO, it becomes his duty to either grant it or reject it. "Once the assessee called upon the ITO to exercise his discretion it was not open to him to ignore that request and not to pass any order thereon."

The issue came up before two judges bench of the Supreme Court when the partners of Ajanta Electricals, a partnership firm in Punjab, were slapped a penalty for filing late returns despite their moving application to the ITO for extention of the time to file their returns.

Justice B P Jeevan Reddy and GT Nanavati said that if Section 138(2) is read alongwith Rule 13 and Form No. 6 it becomes clear that an application for extension could be made even after the period allowed originally or as a result of extension granted had expired.

It was held that "keeping in mind the object of giving discretion to the ITO and the consequences that were to follow from not filing the return within time, we see no justification for reading into the section any limitation to the effect that no application could be made after the time allowed had expired. We seen no reason to construe the section so narrowly."

Source : Financial Express, dated 13-5-1995

PM may preview Co Bill by month-end

The Union Law Ministry expects the Prime Minister to preview the recodified Companies Bill by the end of the month.

The Law Ministry, which has sought time from the Prime Minister to make a presentation on the Bill, expects to be grilled on specific provisions in it for managerial remuneration, inter-corporate investments and non-voting shares. Once the Lok Sabha is able to dispense with the demand or grants by the various ministries and political issues, the Prime Minster's Office (PMO) is likely to slot a day for brainstorming on the Bill, said sources.

The Department of Company Affairs (DCA), which has worked on the draft, had originally prepared a slide presentation for the Prime Minister, Narasimha Rao retains the law and justice portfolio, with H R Bhardwaj, as his minister for state and will consequently have to vet the draft bill, before it is sent to the Cabinet.

Sources say the slide presentation presented by the DCA, may not be called for and the PMO may simply want a long discussion on some ticklish issues that had raised protests from industry before. If the Prime Minister is satisfied with the draft, it will be set to the Cabinet for its approval, before being placed before the parliament.

Opinion is divided within the ministry on whether the Bill may be readied before the session ends on June 1. The pessimists still feel the draft Bill may miss the Budget session. Other Shastri Bhavan sources point out that the PMO had already studied the draft and returned it to the legislative wing of the Law Ministry last month. Only some clarifications to "queries raised" by the PMO, need to be issued.

The Prime minister's Office is believed to have sent word that it would like clarifications on provisions in the Bill for intercorporate investments, managerial remuneration and non-voting shares.

While the draft was being readied last year, industry lobbies had raised quite a bit of dust over all three provisions. The draft is believed to have overridden the industry pleas for raising the ceiling for inter-corporate investments and managerial remuneration. Industry associations and the key chambers of commerce have for a long time been urging the Centre to allow them to plough more of their surplus into other coporates.

Section 370 and 372 of the Companies Act 1956 now allows a company to used 30 per cent of its share capital and free reserves to buy shares in another company. The investing company may plough another 30 percent of its share capital and free reserves into another company as loans. The friendly corporate raider is, however, not allowed to buy into more than 30 per cent of any company's share capital.

The law ministry had been toying with the idea of clubbing Sections 370 and 372, so that inter-corporate investments, be they loans or share purchases, could total 60 per cent of a company's share capital and free reserves. Ultimately, however, the 30 per cent ceiling is believed to have stayed.

Both the Companies Act 1956 and the Companies Bill 1993 allow the Centre to determine a maximum limit that can be paid to whole-time and non-working directors of a company as remuneration. In July last year the Department of Company Affairs (DCA) raised the remuneration limit to two per cent of a company's net profit from one per cent earlier. Industry, however, would prefer the right to determine remuneration limits.

Source : Financial Express, dated 13-5-1995

Professional bodies unhappy over TDS

The Bombay Chartered Accountants Society (BCAS) and 17 other professional associations have made a representation to the finance minister, Dr Manmohan Singh, against the tax deduction at source (TDS) scheme.

This scheme was proposed by the Finance Bill of 1995.

Among the signatories to the representation are the Chamber of Income-tax Consultants, the Indian Merchants Chamber, the Indian Medical Association, the All India Federation of tax Practitioners and the Bar Counsil of Maharastra and Goa.

Calling the proposed deduction (presently at rate of 10 per cent) "grossly" the representation states that the TDS scheme will involve an enormous amount of unproductive paperwork, increase the expenses of professionals, companies and financial institutions and add to the work of the income-tax department.

BSAS has pointed out that the Finance Bill's proposal that income from business or other sources should be computed in accordance with either the cash or mercantile system of accounting from year to year, might result in difficulties for certain classes of assesses. Therefore, suggests BCAS, the notification of accounting standards should be replaced by allowing alternatives where possible.

Source : Economic Times, dated 11-5-1995

News & Views

Rs 13-cr I-T recovered in stock scam case

The Union Government has been able to recover income-tax amounting to only Rs. 13.07 crore from the persons and companies notified in the securities scam related cases against the total demand raised of whooping Rs. 8,468.27 crore - which is more than the country's budget deficit of Rs. 6000 crore in 1994-95.

Out of the total recovery of Rs. 13.07 core as much as Rs. 12.29 crore has been paid by the Fairgrowth Financial Services Limited. The income tax recovery from individuals has remained dismal.

As per the income tax demand raised by the Income Tax Department, Harshad S Mehta has to cougn up Rs 3648 crore as income-tax for the assessment years from 1988-89 to 1992-93. The Department, however, has not yet been able to recover any money from Mehta. This was stated by the Minister of State for Finance M V Chandrashekara Murthy in reply to a Parliament question relating to recovery of income-tax from accused of securities scam.

The Harshad Mehta group as a whole, which include family members and various companies owned by the group, the total income tax due amounts to Rs 5578 crore. The Income Tax Department's record of collecting the dues has remained far from impressive. The tax collectors were able to recover only Rs 18.52 lakh against the demand raised which run into thousands of crore.

Among the group companies of the Mehta Group, the biggest amount is due from Growomore Research and Asset Management Ltd amounting to Rs. 291 crore followed by Cascade Holdings Ltd. (Rs. 155 crore).

After Harshad Mehta, the largest amount is due from Hiten P Dala, who had to pay Rs 1273 crore to clear his income tax dues for assessment years ranging from 1988-89 to 1992-93. The Bhupen Dalal Group, which include individual and the companies, owe Rs 2831 crore to the exchequer. Interestingly, unlike others notified in the scam related cases. Bhupen Dalal as an individual has the distinction of paying the income-tax amounting to Rs. 58.38 lakh for the assessment year 1990-91. But that was the only amount which the Bhupen Dalal Group paid as income tax for several assessment years.

Apart Harshad Mehta and Bhupen Dalal Groups, the biggest amount was due from Fairgrowth Financial Services Limited (FFSL) amounting to Rs 58.65 crore for assessment years 1991-92 and 1992-93. The FFSL, however, had paid Rs 12.29 crore as income-tax. And this was the highest amount paid as tax from among the persons and the companies notified in the scam related cases. The total amount due from persons other than those belonging to these group was Rs 58.93 crore out of which Rs 12.30 crore had been paid.

Source: Financial Express dated, 27-5-1995

Tax Bar Association

Durg-491001 (M.P.)

The Election of the Tax Bar Association Durg (M.P.) for the financial year 95-96 & 96-97 was held on 30-4-1995. Following office bearer have been elected anonimously. Name of the office bearers are as under :-

Shri. D.K. Dixit, Advocate	President
Shri. B.P. Waghela, C.A	Vice-President
Shri. B.R. Yadav, Advocate.	"
Shri K.C. Deshmukh, Advocate	Secretary
Shri. Pannalal Jain, Advocate	Joint-secretary
Shri. Nirmal Kothari, Advocate	"
Shri. Shrichand Lekhwani, C.A.	Treasurer
Shri. H.C. Bafna, I.Tax-Consultant	Executive Members
Shri. Mool Chand Jain, Advocate	"
Shri. Shantilal Jain, Advocate	"
Shri. Santosh Pincha, Tax-Consultant	"
Shri. Vinod Patni, Tax-Consultant	"
Shri. S.D. Rathi, C.A.	"
Shri. Dilip Jain, Advocate	"
Shri Anil Bhawsar, Tax-Consultant	"

News & Views

Delays in tax remittances to RBI flayed by CBDT panel

The Monitoring Committee of Central Board of Direct Taxes (CBDT), Bombay Zone, has objected to the delay in remittances of tax collection to the Reserve Bank of India (RBI) by the four public sector banks. In 1994-95 the delayed remittances amounted to Rs. 270.77 crore.

According to the Committee, the delayed remittance of Rs. 10 lakh and above for more than ten days for the year 1994-95 by the four public banks amounted to 2.96 per cent of the gross tax collection of Rs. 9160.66 crore.

These four public sector banks which are authorised by the government to collect public revenue include State Bank of India (SBI), Bank of Baroda (BOB), Bank of India (BOI).

KBS Chopra, Chief Controller of Accounts, CBDT, Bombay told FENS that the banks are supposed to remit the amount to RBI at the shortest time period which is three days from the date of realisation of amount for local cheques and nine days in case of outstation cheques.

"But it has been observed the banks take advantage of the limit granted to them and as a result, the government has to suffer the losses," Chopra said. He confirmed that almost every bank has defaulted in providing remittances on time in the previous financial year.

Delay in remittances by BOI in 80 items amounted to Rs. 83.45 crore between April 1994 and March 1995. In the same period, SBI defaulted in 85 items amounting to Rs 103.11 crore. Whereas, CBI and BOB delayed remittances to the tune of Rs. 66.08 crore and Rs. 18.13 crore, respectively.

Source : Financial Express, dated 9-6-1995

TN mops up 40 pc more TDS in 1994-95

A total of Rs 410 crore was collected through the deduction at source (TDS) during 1994-95 as compared to Rs. 290 crore last year registering an increase of 40 per cent.

Disclosing this at a seminar on "Tax deduction at source" organised by the Hindustan Chamber of Commerce (HCC) here on Friday. K Subramaniam, Chief Commissioner, Income-tax (Madras Circle), said the scope of Section 194C has been extended now to professional services too and the TDS originally confined to salaries and dividends now includes conveyance and leave travel concessions.

Subramaniam felt that it was important that corporate entities realise the importance of compliance with tax norms on their own.

It was all the more necessary since in India less than one per cent of the population happened to be assessees against payment of tax by about 50 per cent of the population in the advanced countries.

He said that as per the study made by the Finance Ministry, when various exemptions and incentives were taken into consideration, the companies were paying an effective tax of 19.7 per cent of their income or profit.

Subramaniam admitted that there had been a delay in allotting a permanent account number (PAN) due to technical reasons. He appealed to assessee to submit the concerned forms to get PAN.

At the all-India level the department collected a total amount of Rs. 27,000 crore in 1994-95 as compared to Rs. 19,300 crore last year. Subramanian however lamented that the corporate sector had by and large not responded well, showing an increase of only five per cent.

He admitted that there has been a delay in the issuance of refunds and requested tax payers to bring instances to the notice of senior officials of the Income Tax Department. For expediting administrative process in this regard, he said that it have been proposed that Assistant Commissioners of Income Tax be appointed as Refund Officers.

T N Manoharan of Manoharan Chowdhary and Associates presented a paper on the procedural aspects of TDS, R Sekhar of ITI Pioneer AMC Ltd on the substantive provisions of TDS, S Vijayaraghavan of Essveeyar spoke at length on the interest in I-T law.

Source : Financial Express, dated 11-6-1995

Queries and Their Replies

Query No. 1

Arrears of rent received - Assessment of

After the assessment on the income from property on the basis of rent receivable, the rental was increased from a retrospective date and some arrears of rent were received in the current year. Can the arrears received now be taxed in the hands of the assessee.

Reply

Income from property is taxable on annual letting value or the rent receivable/received whichever is higher. If arrears of rent are received in a later year, the same cannot be assessed as the income from property. There is no provision for such assessment of the arrears of rent for an earlier year if the assessment has already been made. If the earlier year assessment has not been made, the same can be made new if there is time limit for the same Reassessment proceedings can also be initiated at the ITO. within the four corners of law.

Query No. 2

Compensation for injury of an employee

Where an employee receives compensation from the employer for an injury suffered by the employee while on duty, can this compensation be brought to tax in the hands of the employee.

Reply

Such a compensation is not in the nature of salary but as the injury is suffered in the course of duty, the same can be treated as "Profit in lieu of salary". If some expenditure is incurred for treating the injury, only the net compensation can be brought to tax. Where the expenditure is more than the compensation, nothing will be chargeable to tax.

Query No. 3

Deduction under section 80C

A person pays premium for insurance in March, 94 but the LIC issues a policy after some delay in the month of May. When can he claim deduction under section 80C of the Income-tax Act ?

Reply

Deduction under section 80C is allowable in the year of payment of premium out of tax payers income. The deduction will therefore be allowable in the assessment year 1995-96. the fact that the policy has been issued in the next year is not relevant for the purpose.

Query No. 4

Dissolution of firm

Partners of a firm decide to convert the business into that of a limit company. In the process, the firm has to be dissolved and the assets the firm have to be transferred to the company. Will this transaction resi in capital gains? if so, in whose hands?

Reply

With effect from 1-4-1988, section 45 was amended and its sub-sectk (4) provides that if the capital assets of the firm are transferred on dissolutio or otherwise. the firm will have to pay capital gains by taking the fair mark value of asset as the full consideration for transfer. Before the amendmei the legal position was that such transaction does not result in transfer the asset goes to the partner.

Query No. 5

Maruti Car received in a lucky draw

The State Government holds a lucky draw for persons making small savings The person getting first price is given a Maruti car which costs Rs. 1,80,00 Is it taxable ?

Reply

Yes. The car is received in a lucky draw and thus covered under sectio 2(24)(ix) of the Income-tax Act. In the case of K.C. Suresh : 199 ITR 26 the Kerala High Court held that the value of car was taxable.

Query No. 6

Return of 80CCB Investment

Under section 80CCB, the tax payer gets a deduction upto Rs. 10,0 in the year of investment. It is also provided that when the capital or intere is returned the same shall be taxable in the hands of the investor. It is nc clear whether the capital invested will also be brought to tax at the tim of return ?

Reply

Section 80CCB clearly provides that the amount deducted from total incom will be taxed when the amount is returned to the investor. The only sna in law is that the definition of 'income' has not been amended to includ this 'sum' and a tax-payer can challenge its taxation by filing a writ an challenging the provision. However, as far as the law is concerned, it doe provide for the taxation of the amount invested under section 80CCB o its return to the investor.

Query No. 7

Taxation of additional compensation on land acquisition and taxabilit of interest allowed on such enhanced compensation.

eason receives enhanced compensation on acquisition of land after ral years of the receipt of original compensation as a result of the orders nd acquisition officer/District Court/High Court. Interest is also received the additional compensation. How is the additional compensation to axed? What is the way of taxing the amount of interest received from e to time? What happens if the amount of compensation is enhanced later on it is reduced ?

ply

tion 45(5) makes provision for taxing the additional compensation as ital gains. The compensation awarded in the first instance shall be essable in the year of first transfer and any additional compensation in respective year of receipt instead of the year in the transfer of the capital et. For working out the capital gains, the cost of acquisition in the hands the receiver of the additional compensation will be deemed to be nil.

e interest allowed by a court order is taxable in the year of the order ssed by the court. It may be stated that agricultural land is not capital set and hence sale of such land does not give rise to capital gains.

a case where an intermediate authority allows an enhanced compensation, t appeal against such order is pending, the recipient may wait till the spute is settled. Where the additional amount is once taxed, it is difficult get it rectified except to the extent it falls under section 154.

uery No. 8

heft of car - Position of depreciation on new car

businessman's car in which depreciation has been claimed from year to ear has been stolen. The WDV of the car is Rs. 60,000 and the insurance ompany pays Rs. 1 lac for the car stolen, what will be the position for x purpose if (i) no new asset in the block is acquired in the accounting ear; or if (ii) a car is purchased for Rs. 2 lacks in the accounting year self.

eply

rovisions of section 50 of the Income-tax Act will be relevant.

) In the first situation, the provision of section 50(2) will apply and short erm capital gain will become chargeable on Rs. 1,00,000 - Rs. 60,000 = Rs. 40,000.

ii) In the second situation, the WDV of the block will be worked out as below :

Rs. 1 lac - Rs.60,000 + Rs. 2,00,000 = Rs. 1,40,000. Depreciation will be allowable on this as written down value.

Notes